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Dock Tender with Dock Use - Tender Tender
Dock. (h)

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(j) Dock of the Dock Tender Tender Tender Tender Tender
Tender Tender Tender Dock Dock Tender Tender.
Dock. (j)

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(l) (m) The Tender Tender - Dock Dock Tender. (l)

(n) Tender of Dock Tender Tender Tender Tender Tender
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(o) Tender Tender Dock, Tender Tender Dock Dock.
Tender Tender Tender Dock. (n)

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No. 211
July 7, 1950

SUBJECT: WARRANTS -- WHEN VOID -- HOW RE-ISSUED OR ACCOUNTS PAID -- EXPIRATION DATE.

Dear Sir:

I have your request for an opinion as follows:

> "Government Code, Section 29802, provides that a warrant is void if not presented to the treasurer within two years.
>
> Does this have the effect of extinguishing the obligation for which the warrant was issued originally?
>
> If not, upon what authority may the warrant be re-issued or the account paid."

O P I N I O N

As stated in the request, Section 29802 of the Government Code, said section having been enacted in 1947, declares as follows:

> "Any warrant issued for the giving of aid and payable to an indigent, a needy aged person, a needy child, or a needy blind person, or issued for the giving of such aid and payable to the guardian, trustee, disbursing agent, or any custodian of the funds or estate of any of them is void if not presented to the county treasurer for payment within six months after its date.
>
> "Any other warrant is void if not presented to the county treasurer within two years after its date."

The second paragraph of the request relates to whether the non-presentation of a warrant has the effect of extinguishing the obligation for which the same was issued originally. In this connection it must be noted that non-presentation within two years has the effect of rendering the warrant "void" as distinguished from "voidable." If it be true that void means null, and without effect, then it must have been the intent of the legislature that no enforceable obligation was extant. Moreover, if there ever was an obligation, it survives but is not legally enforceable.

The foregoing should answer the question raised in the second query of the request, to wit: No obligation being existent, there can be no authority to re-issue or to issue another warrant, and no authority to pay such an account.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Harry D. Ross,
Controller

EIF

OPINION NO. 212

July 7, 1950

SUBJECT: RIGHT OF CITY ENGINEER TO CONSIDER APPLICANT'S PROPERTY IN COMPUTING AREA ON APPEAL FROM RULING OF CITY PLANNING COMMISSION--SECOND OPINION.

Dear Sir:

This office is in receipt of a request for an opinion as follows:

> "Your opinion is requested as to whether the City Attorney's Opinion of April 2, 1948 regarding the area to be used in computing the sufficiency of signatures to authorize an appeal from the decision of the City Planning Commission also holds in a case where the property has been rezoned and the property owners within the 300 feet radius wish to protest the rezoning. In other words should the area rezoned be considered as a portion of area affected."

O P I N I O N

I have carefully examined Section 117 of the charter, Sections 41 to 49 inclusive, of Article 2, Chapter II, Part II, of the San Francisco Municipal Code (City Planning Code), as well as the opinion of my predecessor, Mr. John J. O'Toole, dated April 2, 1948. It appears to me that the opinion of Mr. O'Toole is correct. I can perceive no sound reason why the query in your request should be treated any differently than was done with respect to the request upon which the opinion of April 2, 1948 was predicated.

Therefore, you are advised that the area sought to be rezoned should be included in your computations for the purpose of ascertaining the percentage necessary to authorize an appeal.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Sherman P. Duckel, Director
Department of Public Works

BJWJR

Opinion No. 213
July 11, 1950

SUBJECT: PETS UNLIMITED -- CANCELLATION OF PERMIT.

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

"On November 15, 1949, application was made for transfer of permit for a Kennel and Dog and Cat Hospital from the former owner, Dr. T. R. Creely, 3170 Sacramento Street, to Pets Unlimited, Inc. The application for permit was signed 'Pets Unlimited Inc. by Fred G. Zelinsky, Chairman of Building Committee.' After due process a hearing was held and permit was granted November 29, 1949, in the name of Pets Unlimited, Inc.

"Recently this department has received from the Honorable Twain Michelsen the appended correspondence. You will note that Judge Michelsen claims that the permit was improperly issued and should forthwith be cancelled.

"May we have your advice in this matter."

O P I N I O N

I have read all of the data as forwarded by you in connection with your request for an opinion, including the seventeen page letter of Judge Michelsen. There would seem to be no purpose in quoting extensively from the data submitted, as the substance thereof can be stated as follows:

1. It is contended that the public funds which were received by Pets Unlimited, Inc., were received for the construction of a new shelter for dogs and cats, that these funds constituted a public trust, and that these funds (representing donations that were received) should not be used as part of the purchase price of an old piece of property, and one which admittedly was being purchased at a price far in excess of its reasonable market value.

2. It is further contended that Pets Unlimited, Inc., is improperly operating in San Francisco at the present time, in view of the assertion that there has been a failure to comply with the requirements of Sections 10401 and 10402 of Part 4, Div. 2, Title 1, of the Corporations Code of the State of California, which requires that the Chief of Criminal Identification and Investigation, Department of Justice, issue and attach to articles of incorporation of corporations formed for the prevention of cruelty to children or animals an endorsement "as evidence of necessity".

It is claimed that the license heretofore granted on November 29, 1949, by the San Francisco Department of Public Health to Pets

Unlimited, Inc., to operate a dog and cat hospital, was improperly issued, and should be rescinded.

It is evident from the above statements (which constitute a brief summary of the arguments and contentions made in the data submitted with your request) that the contentions are urged that Pets Unlimited, Inc., has not complied with all the requirements of the Corporations Code in connection with its organization, and further, that it is not properly administering or expending the trust funds collected by it from the public. An analysis of the provisions of the Corporations Code reveals that if either or both of these conditions exist, they constitute subject matters which should properly be addressed to the Attorney General of the State of California for his consideration, and action if the case would appear to justify such.

I refer you, in this connection, to Section 4690 of the Corporations Code, which provides as follows:

> "The Attorney General may bring an action against any corporation or purported corporation, in the name of the people of this State upon his own information, <u>or upon complaint of a private party</u>, to procure a judgment dissolving the corporation and annulling, vacating, or forfeiting its corporate existence upon any of the following grounds:
>
> "(a) The corporation has seriously offended against any provision of the statutes regulating corporations.
>
> "(b) The corporation fraudulently has abused or usurped corporate privileges or powers.
>
> "(c) The corporation has violated any provision of law by any act or default which under the law is a ground of forfeiture of corporate existence."

I further refer you to Section 9505 of the Corporations Code, which provides as follows:

> "A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure."

In view of the express provisions of the Corporations Code, as herebefore quoted, authorizing the Attorney General to take proper

action against corporations which act in violation of the provisions of the law, and likewise to act in instances where nonprofit corporations hold property subject to any public trust and act in violation thereof, all the matters that have been here submitted to the Director of Public Health of San Francisco more properly should have been submitted to the Attorney General for his consideration and action should the same be necessary. In the absence thereof, I can see no authority resting with the Director of Public Health to pass upon the subject as to whether the corporation known as Pets Unlimited, Inc., has properly complied with all the laws, or has committed acts of violation of its public trust. Rather, it would seem to me, until the Attorney General had instituted and successfully completed proper legal proceedings which would result in a determination of the matters in question adverse to the corporation, that the Director of Public Health would have the right to assume that Pets Unlimited, Inc., was properly and legally organized and was properly and legally expending its moneys, and hence there would be no justification at the present moment for the Director of Public Health on the basis of the facts raised in this inquiry, to rescind the license granted on November 29, 1949, to Pets Unlimited, Inc., to operate a dog and cat hospital.

Incidentally, investigation has disclosed also that notice of hearing on the permit was given as provided by Part III of the San Francisco Municipal Code and that a hearing was held in accordance with said provisions. There were no protests at the hearing and there was no appeal to the Board of Permit Appeals. The time for the appeal has since expired.

Respectfully submitted,

DION R. HOLM,
City Attorney.

RJB

To: J. C. Geiger, M.D.
Director of Public Health

cc: Mr. Thomas A. Brooks
Chief Administrative Officer

No. 214

July 11, 1950

SUBJECT: MOVING A MONUMENT IN GOLDEN GATE PARK DEDICATED TO FRANCIS SCOTT KEY -- ALFRED FUHRMAN REQUEST.

Dear Sir:

I have your request for an opinion as follows:

"At the request of the Park Commission, I am writing to you to ask your opinion on the following:

We have a monument dedicated to Francis Scott Key at the entrance to the Academy of Sciences, Golden Gate Park. The Park Commission is desirous of moving this to a site in the Music Concourse and would like to know if the funds for moving of this statue could be taken from the Alfred Fuhrman Bequest, which specifies that the moneys are to be used for the beautification of Golden Gate Park.

The cost of removing this monument would be approximately $5,000."

O P I N I O N

The last will and testament of Alfred Fuhrman with respect to the above subject matter, reads as follows:

"One-half of said rest and residue to the San Francisco Public Library for the acquisition of additional books--on economic and political subjects, and the remaining one-half of said rest and residue for the further adornment of our famed and beloved Golden Gate Park, as may be determined by the Park Commissioners of said City and County, and it is my intent and will that the Public at large shall be and become my ultimate beneficiaries."

As pointed out in my opinion dated December 19, 1945 I called to your attention the definition of the word "adorn" as set forth in Webster's New International Dictionary, Second Edition. At that time I indicated that to adorn meant to embellish, to dress with ornaments, to render pleasing or attractive, etc.

It was also pointed out in that opinion that the maker of the will used the expression "further adornment" indicating that he desired the addition of something to that which already existed.

In my opinion the removing of the statue from the Academy of Sciences to the Music Concourse could not be a "further adornment" of Golden Gate Park within the terms of the will and the contemplation of the maker and therefore the cost of such an operation could not be chargeable to the Alfred Fuhrman bequest.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Mr. Harvey E. Teller
Manager
Park & Recreation Commission

EFD

OPINION NO. 215

July 21, 1950

SUBJECT: AUTHORITY OF BOARD OF FIRE COMMISSIONERS TO PERMIT PRIVATE ORGANIZATION TO HOLD MEETINGS AND CONDUCT A MUSEUM ON FIRE DEPARTMENT PROPERTY; PHOENIX SOCIETY.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"The Board of Fire Commissioners ask that an Opinion be rendered to this Board relative to the following letter:

June 27, 1950.

Board of Fire Commissioners,
San Francisco Fire Department,
City Hall,
San Francisco, California.

Gentlemen:

The Phoenix Society of San Francisco for some time has been desirous of obtaining a regular meeting place with the thought of developing it into a museum of San Francisco Fire Department history. In order to start this program we wish to obtain your permission to hold our meetings and accumulate material at the quarters on Octavia Street formerly occupied by the Salvage Corps and at present being partially used by the Auto School.

We will appreciate your informing us the terms under which you would be willing to permit us to use these quarters. We shall be entirely willing to sign any waiver of non-responsibility or carry such insurance as you may consider necessary.

Our goal is to build up a collection which will become a show place for residents and visitors alike which will be available at all reasonable hours. Of course, we will expect to vacate these quarters whenever their full use is required by the Fire Department.

Ultimately, we hope to assemble a representative collection of historical objects including a steam pumper

"complete with harness and as much other old-time equipment as can be located.

Your favorable consideration will be appreciated by the Society.

Very truly yours,

(Signed) S. G. Clark.

Q U E S T I O N

Can the Board of Fire Commissioners permit the use of the property of the Fire Department for the purposes of developing a museum of the San Francisco Fire Department history? Said property to be used by a private organization, namely, The Phoenix Society of San Francisco. If so, under what conditions may the Board grant this usage. "

O P I N I O N

It is well appreciated that the philanthropic effort of the Phoenix Society of San Francisco is most meritorious and that their offer would be not only of great interest to the visitors to the museum but would also make the citizens of San Francisco more appreciative of the problems of the Fire Department. It is incumbent upon me, however, to determine whether the charter of the City and County of San Francisco would permit the Board of Fire Commissioners to allow the use of premises under its jurisdiction to a private organization. It is necessary, therefore, to review the request in light of the charter.

Sections 36, et seq. of the Charter, outlining the authority of the Board of Fire Commissioners, is silent with respect to any authority of the Fire Commission to permit private organizations to use its premises for either holding meetings or to conduct any private enterprise, including the development of a museum.

Section 91 of the Charter provides that the Director of Property shall have charge of the sale and lease of all real property except as otherwise provided by the Charter.

Section 93 provides, in part, as follows:

> "When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property

shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease."

It is apparent from the reading of Section 93, as quoted above that should the Board of Fire Commissioners feel that they have surplus property, the Board of Supervisors may by ordinance authorize the lease of said property. The section, however, also provides that the Director of Property must ask for bids and that the lease must be granted to the highest responsible bidder at the highest monthly rental. The lease may not exceed a period of twenty years. There is no guaranty, of course, that the Phoenix Society will be the highest bidder. There is apparently no other means permitted by the Charter other than as provided by Section 93.

I must therefore advise that there is no authority in the Charter which would permit the Board of Fire Commissioners to authorize the Phoenix Society of San Francisco to hold meetings on the Commission's property, or to develop in any properties under the Commission's jurisdiction a historic museum outlining the history of the Fire Department in San Francisco.

It may well be that the Phoenix Society of San Francisco may be interested in donating to the City and County of San Francisco various exhibits. Should this be the case, and should the Fire Commission itself have the necessary facilities and should it in its judgment feel that such a museum would make the citizens of San Francisco more cognizant of the problems of the Fire Department, the Fire Commission may provide for the establishment of such a museum.

Very truly yours,

DION R. HOLM
City Attorney

TO: Board of Fire Commissioners
2 City Hall
San Francisco 2
Attention: Mr. Thos. W. McCarthy, Secy.

RJB

No. 216

July 21, 1950

SUBJECT: AUTHORITY OF PHYSICAL EDUCATION INSTRUCTOR TO ACCOMPANY BASKETBALL TEAM TO NATIONAL TOURNAMENT; CITY COLLEGE; MR. RALPH HILLSMAN.

Dear Sir:

Under date of May 3, 1950 this office was requested for an opinion as to the liability of the city for the expenses of one Ralph Hillsman, which services are best described in the letter involving the request, to-wit:

> "The Board of Education at its meeting of March 14, 1950, adopted Resolution No. 03-14S4 authorizing Mr. Ralph Hillsman, physical education instructor at the City College to accompany the basketball team to the National Tournament held at Hutchinson, Kansas, March 21-25, 1950.
>
> "'03-14S4. RESOLVED: That Mr. Ralph Hillsman, instructor at the City College of San Francisco, as a representative of the Board of Education, be and is hereby authorized to accompany the City College Basketball Team to the National Junior College Basketball Tournament to be held at Hutchinson, Kansas, March 21 through March 25, 1950; traveling time to be allowed; expenses to be paid from funds appropriated for the purpose; no substitute will be required.'
>
> "The expense voucher in the amount of $190.50 has been returned by the Controller without approval, presumably on the basis of a lack of legal authority. We are cognizant of your views that under the existing provisions of the State Education Code a board of education cannot pay the traveling expenses of student athletic teams. However, we do believe that a different situation is presented in connection with the right of the Board of Education to send a member of the faculty and pay his expenses.

"In this connection, may I point out that the members of the basketball team were participating in this tournament as students of the college during the time that the college was in session. Under such circumstances, the school district would be liable for any injuries which were incurred as a result of the negligence of the district. It has been held by the courts on numerous occasions that allowing students to be unsupervised by a certificated employee amounts almost to negligence per se. Without doubt, if the Board of Education allowed these students to be absent from school to go to Kansas representing the City College, and failed to provide supervision and an accident occurred which possibly could have been averted if supervision had been provided, the school district would be liable for damages. ******

"The resolution of the Board of Education designated Mr. Hillsman as its representative.

"Inasmuch as we believe that we do have the responsibility of providing supervision of students under such circumstances, your opinion is respectfully requested as to whether or not the Board of Education may pay for the traveling expenses of the instructor who is responsible to provide the necessary supervision."

O P I N I O N

As appears, the expenses amounted to $190.50, and the voucher was returned by the Controller without approval, presumably on the basis of lack of legal authority.

It is my opinion that Section 2203 of the Education Code applies and that such expenses are allowable. Section 2203 provides as follows:

"2203. The governing board of any school district shall provide in cities, and in cities and counties, having boards of education, and in other districts employing 30 or more teachers, for the payment of the traveling expenses of any representative of the board when performing services directed by the board."

It might be of interest to note that Section 13203 of the Education Code contains the following provision:

> "13203. Provision for payment of traveling expenses: Direction to attend convention or conference or to visit schools. The governing board of any school district shall provide for the payment of the actual and necessary traveling expenses of any employee of the district when performing services for the district under the direction of the governing board. The governing board may direct any employee of the district to attend any convention or conference or to visit schools for the discussion or observation of any school matter appertaining to the duties of the employee or any question of interest to the school district."

In view of the statement made in the request and the attendant circumstances, it is my opinion that the claim of Mr. Hillsman for his expenses in the sum named must be honored by the Controller.

Respectfully submitted,

DION R. HOLM,
City Attorney

TO: IRVING G. BREYER, Legal
Adviser to Board of Education,
Civic Auditorium, San Francisco 2.

EIF

No. 217

July 25, 1950

SUBJECT: HANDLING OF PATIENTS' HISTORIES - WHETHER MEDICAL RECORDS ARE CONFIDENTIAL AT SAN FRANCISCO HOSPITAL.

Dear Sir:

Through Thomas A. Brooks, Chief Administrative Officer, your department addressed a request for an official ruling from this office on the handling of patients' histories in the City and County Hospital. It was presented in Dr. Albers' letter of May 9th as follows, which was attached to your memorandum.

> "At the time of the hearing of the case of Mr. Eugene Hosler, recently concluded, the question was raised by the plaintiff's attorney as to the handling of patients' histories in this Hospital.
>
> "It was his contention that, in a case where I personally, as Superintendent of the Hospital, had been named as a defendant, I had no right to release the patient's history to my attorney to help in the preparation of the defense of the case.
>
> "It was the contention of the attorney in the defense of my case that, in all instances, medical records were confidential information between the patient and the Doctor except cases where he was sued as Superintendent of the Hospital and that it was my right and privilege to release any and all information to my attorney that would aid in the preparation of the defense.
>
> "May we request through you a ruling relative to this from the City Attorney."

OPINION

The question involved, as revealed through Dr. Albers' letter, relates to his right to release the history of a patient under his supervision, where he

personally, as Superintendent of the Hospital, has been named as a defendant, in the course of a specific trial. From the third paragraph of Dr. Albers' letter of May 9th, it appears that someone contended that "in all instances, medical records were confidential information between the patient and the doctor except cases where he was sued as Superintendent of the Hospital," and the doctor contends that it is his right and privilege to release any and all information to his defense attorney that would aid in the preparation of the defense.

The particular question presented by the request of Dr. Albers is answered by the very provisions of Section 1881 of the Code of Civil Procedure and especially in Section 4 thereof. The latter sub-section provides that a doctor may be examined in regard to any information required wherein he was attending the patient, which information was necessary to enable him to prescribe for such patient. Ordinarily such communications between patient and physician are deemed privileged. However, this privilege is waived by the patient under the provisions of Section 1881 aforesaid, "where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action, that any physician who has prescribed for and treated said persons and whose testimony is material in said action shall testify." See: Phillips v. Powell, 210 Cal. 39.

By bringing action for personal injuries the patient waives the privilege and if the records contain evidence relating to the merits of the action or the defense therein they are available to the patient and his attorney under Section 1000 of the Code of Civil Procedure, which provides a court in which an action is pending may make an order for the inspection of documents containing evidence relating to the merits of the action, as well as under the provisions of Section 1985 of the Code of Civil Procedure, which provides for issuance of a subpoena duces tecum. The foregoing being true, I can conceive of no reason why they should not be available to a defendant in the action who has such records under his control and his attorney who acts in his behalf and as his agent.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: DR. J. C. GEIGER, Director of Public Health
CC: THOMAS A. BROOKS, Chief Administrative Officer
DR. T. E. ALBERS, Superintendent, San Francisco Hospital

Opinion No. 218
August 2, 1950

SUBJECT: OBLIGATION OF CITY TO IMPROVE STREETS IN WHICH IT HAS FEE SIMPLE TITLE; GREENWICH AND HYDE STREETS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"The Director of Public Works offers the following comments on your opinion No. 191, dated June 1, 1950, on the subject 'Obligation of City to Improve Streets in which it has Fee Simple Title; Greenwich and Hyde Streets'.

"Leavenworth to Hyde Street Paragraph 1 of the opinion states that the City is obligated for the repair and maintenance of this entire block because the City at one time performed certain repair work in a portion of the block. I believe this part of the opinion is based on a misunderstanding of the actual situation. The question which was posed states that Greenwich Street 'has only a narrow strip of pavement.' This is quite misleading since the pavement is actually about normal width and is in part wider than normal width. The question did not make it clear that the pavement extends only about three-quarters of the distance from Hyde Street to Leavenworth Street and that the remaining quarter of the block is not paved and cannot be paved and, furthermore, has not been improved in any way at City expense. I believe it was the City Attorney's intention to rule that the City is responsible for the repair and maintenance of that portion of this block which was covered by the repair work performed by the City in 1927.

"May I have the benefit of your advice on the question raised by the Director of Public Works."

O P I N I O N

Additional information furnished indicates that the pavement on Greenwich Street, between Hyde and Leavenworth Streets, extends for only three-quarters of a block, and that the remaining one-quarter of the block is not paved, and cannot be paved, and has not been improved in any way at City expense.

You are accordingly advised therefore, that there would be no obligation on the City to undertake the repair and maintenance of the remaining one-quarter of the block on Greenwich Street between

Hyde and Leavenworth Streets which has never been improved. In this connection, see our answer to your second query in our opinion of June 1, 1950, No. 191.

Respectfully submitted,

DION R. HOLM,
City Attorney.

RJB

To: Mr. Thomas A. Brooks
Chief Administrative Officer

cc: Department of Public Works

No. 219

August 2, 1950

SUBJECT: REALLOCATION OF FUNDS; CONTRACTUAL SERVICES; SECTION 77 OF THE CHARTER.

Dear Sir:

I have your request for an opinion, as follows:

"At the last meeting of the Art Commission, President Harold Zellerbach, requested me, as a member, to obtain from you an opinion on the following problems in which the Commission is interested for its guidance:

"(1) Assume that an appropriation has been made by the Board of Supervisors for the Art Commission and that the same has been allocated to that body for use in 'contractual services'; assume further that before the end of the fiscal year, all of the appropriated money for that specified use has not been consumed. Under those circumstances can the Commission, then, by its own resolution, request the Controller to transfer the unused portion of said appropriation to another use, namely, for 'capital expenditures' or for the acquisition of equipment? And can the controller legally comply without further action or reappropriation by the Board of Supervisors?

"(2) Can the converse of the foregoing objective be accomplished? That is to say, can the unused portion of the funds on hand, which had originally been appropriated for capital expenditures or equipment, be so transferred and used for contractual services?"

O P I N I O N

Section 77 of the Charter, which bears the caption "Transfers," states:

"Upon written recommendation of the chief administrative officer, or board or commission for the use of which funds have been appropriated, and the approval of the mayor, the board of supervisors may transfer an unencumbered balance, or

"part thereof, of an appropriation made for the use of one department, to another. No such transfer shall be made of utility, bond, school, pension or trust funds, except by way of loans as in this charter provided. On request of a department head and approval by the chief administrative officer, board or commission, respectively, and on the authorization of the controller, funds appropriated for a specific purpose of such department which become surplus may be transferred and and used for another specific purpose within the department; provided, however, that such surplus shall not be transferred to a capital improvement project unless such project shall have been previously approved in accordance with the provisions of sections 69, 69.1, 72 or 116.1 of this charter." (Emphasis added.)

The affairs under the control of the Art Commission constitute a department of the city government.

Section 19 of the charter provides that "each commission appointed by the mayor....shall have powers,...(b) to appoint one of its members as president...," and §20 provides that the "chief executive appointed by each...commission... shall have the powers and duties of a department head,..."

Therefore, if during the fiscal year funds appropriated to the Art Commission for contractual services become "surplus," the president of the Commission, after approval by the Commission, may request the controller to make such funds available for capital expenditures. And the controller has authority to comply without action by the Board of Supervisors. (If the controller declined to comply, a reappropriation by the Board of Supervisors would be necessary.)

In the same manner, funds originally appropriated for use by the Commission for capital expenditures or equipment can, if they have become surplus and if the controller authorizes it, be transferred and used by the Commission for contractual services.

Sections 69, 69.1, 72 and 116.1 (referred to in §77 of the charter) in general require that all "capital improvement projects" must be referred to the department of city planning

for a report on whether they conform to the master plan, and provide that until this is done no money can be appropriated for such a project. Before surplus funds could be transferred to a capital improvement project, the matter would first have to be referred to and reported on by the department of city planning.

Respectfully submitted,

DION R. HOLM, City Attorney.

TO: ART COMMISSION
100 Larkin Street
San Francisco 2
Attention: John K. Hagopian, Member.

GEB

No. 220

August 2, 1950

SUBJECT: PORTOLA DRIVE; ST. FRANCIS WOODS ASSESSMENT - RESTRICTIONS.

Dear Sir:

This office is in receipt of request from you of an opinion as follows:

"On May 26, 1941 an agreement was entered into between the City and County of San Francisco and the St. Francis Homes Association, a corporation, a copy of which is attached hereto, marked Exhibit A.

"The agreement was approved by Supervisors' Resolution No. 1811 on May 13, 1941, and the said sum of $1,723.96 was paid to the Association pursuant to said agreement.

"On February 3, 1950 the Secretary of the Association transmitted an upkeep assessment for the City-owned lots, which he states were established on the basis of .005 per square foot, and become payable now by reason of the fact that the covenants and conditions to which the properties are subject have been extended for a further period of twenty years as of January 1, 1950. Said resolution provided for the purchase of several parcels of real estate from six owners, none of which included the St. Francis Homes Association, and the payment of certain sums specified in said resolution in consideration therefor. (A copy of said resolution is attached hereto, marked Exhibit B.)

"A resolution was prepared by the Department of Property to pay the sum of $311.99 to the St. Francis Homes Association for the upkeep assessments on said property for the year 1950, recommended by the Department of Public Works and the Director of Property, and approved by the Chief Administrative Officer. It was returned to the Director of Property by the Controller who has refused approval of the resolution as he believes 'that the original agreement and release under which this property was acquired released San Francisco from this and any future assessments.' (A copy of the proposed resolution is attached hereto, marked Exhibit C. A copy of the letter from the St. Francis Homes Association transmitting the upkeep assessment is attached hereto marked Exhibit D.")

O P I N I O N

The Code of Civil Procedure, Title VII, Sections 1237 to 1266.1 sets forth the provisions relating to emiment domain, which is defined as follows in Section 1237:

> "Emiment domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title."

Section 1240 states:

> "The private property which may be taken under this title includes:
>
> "1. All real property belonging to any person; . . . . ."

Section 1266 reads as follows:

> "Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel."

Section 1266.1 provides:

> "A county or a city may acquire land by gift or purchase from the owner thereof for any of the purposes enumerated in Section 1266 of this code."

The opinion of the City Attorney dated May 21, 1947, No. 3963, holds that the zoning laws of a municipal corporation are not applicable to property owned by the municipal corporation in its proprietary capacity which is devoted to a public use, unless the municipal corporation is included within the provisions of the zoning ordinance expressly or by implication. See, also, City Attorney's opinion No. 490, September, 1931, to the same effect.

In the case of Friesen v. City of Glendale, 209 Cal. 524 (1930) the defendant proposed constructing a public street across a portion of lot 2 in Tract 4335 in the city, and the plaintiffs were owners of property in the tract. When the tract was laid out all of the deeds conveying lots therein contained, among others, the restriction that said premises "shall be used for residence purposes only"; all the lots were laid out under a general residential plan and deeds to purchasers thereof contained similar restrictions, each inuring to the benefit of the other lots in the tract. The defendants, Andrews and wife, acquired the said Lot 2, and the same was accepted by them subject to said restrictions. Thereafter they delivered to the city for public street purposes the south 50 feet of said Lot 2. The plaintiffs did not join in the dedication. The city accepted the offer of dedication and proceeded to order the improvement. It was the contention of the plaintiffs that so long as the restriction on said Lot 2 for residential purposes remained in force, the owner of each lot in the tract laid out under the general plan had a proprietary interest in the portion of the lot so proposed to be improved for street purposes, which interest may not be taken or damaged for public use without compensation as provided in section 14 of Article I of the Constitution.

On appeal from a judgment permanently enjoining the City of Glendale from constructing said public street, the court in reversing the judgment said:

> "The building restriction under consideration is in the nature of a negative easement or equitable servitude. It is not a positive easement or right in the land itself which would permit of the physical use or occupation thereof by the other lot owners in the tract. It is merely a right enforceable in equity as between the parties to the contract, or their successors with notice, on the theory that it would be unconscionable to permit one who had contracted to use his property in a particular way to violate his agreement. It is a familiar rule that when the physical conditions in the vicinity of the land thus restricted have so changed as to render it unconscionable to enforce the restriction, equity will refuse to enforce and the restriction as to its enforceability then fades out of the contract of the parties. It is also well established that the 'provisions of an instrument creating or claimed to create such a servitude will be strictly construed,any doubt being resolved in favor of the free use of the land.' This rule would seem to be especially applicable where the title to the land is acquired by a municipality for public street purposes. To construe the instrument strictly in favor of the servitude would impose

"upon the city the obligation to use the land acquired for residential purposes only, a use to which the city obviously has no power to devote land acquired for street purposes. A construction strictly against the covenant would permit the city to acquire the land freed from the restriction. Furthermore, a duly enacted law providing for such a restriction, binding upon private parties, is not binding upon the sovereign unless it appear expressly or by necessary implication that the sovereign consented to be so bound. Much less would the city be bound "by the terms of a private contract to which it was in nowise a party. (Und. mine)

"It therefore appears that the city may proceed as contemplated unless the plaintiffs and others similarly situated in the tract have such a property interest in the portion of lot 2 acquired by the city as would require that such interest be purchased or condemned before the city may be permitted to construct a public street thereon. It was conceded by counsel for the plaintiffs at the oral argument, and we think properly, that the legal situation of the parties hereto would be the same whether the proposed street were to be improved on property acquired by the city by voluntary dedication or by proceedings in eminent domain. 'The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation.' ..... The plaintiffs expressly 'do not contend that parties may by private contract restrict the exercise of the power of eminent domain,' yet by private contract with their neighbors they have created, if their position be sustained, an estate inherent in each lot in the tract protected against the taking or damaging thereof without compensation and have brought about a situation where the number of the parties defendant and of the interests to be appraised in condemnation would be manifold. ..... It is true that the increase in the number of the defendants and interests to be appraised is not determinative or controlling, provided an estate be created which must be measured in money in the condemnation suit, but such results may be considered where we approach a contention that by private contract an estate in land unknown to the common law or the law of this state is created which would have the result of greatly increasing the cost of condemnation proceedings and making them more burdensome on the public. As above noted, the

"interest sought to be imposed on said portion of lot 2 is no more than a negative easement or an equitable servitude. It does not rise to the dignity of an estate in the land itself. It is not a property right, but is a contractual right cognizable in equity as between the contracting parties, not binding on the sovereign contemplating a public use of the particular property taken. This was expressly so declared in the leading case of United States v. Certain lands, 112 Fed. 622. The declarations of the court in that case are in accordance with reason and the weight of authority on the subject. No case in this state is in point and decisions in other states (citing cases) are not persuasive in the light of the declarations of this court as to the nature of the restrictive covenant relied upon by the plaintiffs herein and the further consideration that parties may not by mutual covenants in private contracts create for themselves an estate in land not known to our law and thus entitle them to compensation where no such right existed before."

In the case of Anderson v. Lynch (Georgia Supreme Court, decided 1939 and reported in 3 S.E. 2d 85) the syllabi are as follows:

"Eminent Domain, § 151 - compensation for taking of building restrictions.

1. Where all of the lots in a subdivision were sold under covenants that they would be used for residential purposes only, and the county purchased or was about to purchase one of the lots for use as a public road, owners of other lots did not have any interest or ownership in the lot about to be thus used, so as to entitle them to damages or compensation because of such use.

"Contracts, §211 - Covenants, §22 - Eminent Domain, §151 - compensation for taking of building restriction

2. If the covenants should be construed as intended to restrict the right of the county to acquire and use any of the property for the purposes of establishing a new public road, they would be contrary to public policy and void. A contract will be construed as made for a legal rather than for an illegal purpose, whenever it may reasonably be so interpreted. Upon application of this principle, the covenants involved in the instant case are construed as having no reference to

"the right of the county authorities to acquire and use any of the lots for the purpose of a public road, or to the right of anyone to sell or dedicate his lot for that purpose.

"Eminent Domain, §§ 107, 151 - notice of proceedings - compensation.

3. Even if the owners of other lots might sustain some damage by the establishment of such new public road, since they own no property interest in the land about to be used for that purpose, any damage suffered by them would be merely consequential or incidental, and they would not be entitled to notice or other compliance with the law as to condemning property for such public purpose."

The Anderson case is cited in 122 A.L.R. at page 1456, et seq., and there is an annotation on the same subject commencing at page 1464, which quotes the Friesen case.

In the Kubach v. McGuire case, 199 Cal. 215 (1926) the city charter provided:

"No building, structure or any part thereof of a height exceeding one hundred fifty feet shall be erected within that portion of the city described as follows: (describing the area)."

The city proposed construction of a new building within said area which would be 400 feet in height; this appeal is the result of an application for a writ of mandate to compel respondent, as president of the Board of Public Works, to sign a certain contract, the respondent having refused to sign the contract on the grounds that it would violate said charter section.

In granting the writ the court said:

"It is the contention of respondent that the said charter provision is applicable alike to the city in the construction of its public buildings as to the inhabitants of said city in private enterprises. It is the contention of the petitioner that the city is not bound unless the language of the limitation is clear and unmistakable, to the effect that the city itself should be so bound, and that such language does not here appear.

"We are of the opinion that the contention of the petitioner should be sustained. Under the constitution the charter of the city is not only the organic law of the city but it is also a law of the state within the constitutional limitations (Ex Parte Sparks, 120 Cal. 395, 399, /52 Pac. 715/; Dalton v. Lelande, 22 Cal. App. 481, 487 /135 Pac. 54/; Stern v. City Council of Berkeley, 25 Cal. App. 685,688 /145 Pac. 167/.) Being an enactment in the exercise of the law-making power of the state it is subject to the recognized rules of statutory construction. In the interpreation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. (Marin Mutual Water Dist. v. Chenu, 188 Cal. 734 /207 Pac. 251/; Balthasar v. Pacific Elec. Ry.Co., 187 Cal. 302 / 19 A.L.R. 452, 202 Pac. 37/; Mayrhofer v. Board of Education, 89 Cal. 110 /23 Am. St. Rep. 451, 26 Pac. 646/; Whittaker v. County of Tuolumne, 96 Cal. 100 /30 Pac. 1016/.) The rules laid down in the foregoing cases would seem to apply to the city in its present situation, and to justify the conclusion that it was not intended that the city should be so restricted in the construction of its public buildings. This conclusion is fortified by the showing, also made by the petition herein, that since the adoption of said charter provision a public library building and a new hall of justice, both in excess of 150 feet in height, have been constructed within said district without objection. While neither the overwhelming vote in favor of a new city hall of this particular height and design at the location mentioned, nor the construction of other public buildings within said district in excess of the general charter limitation, is conclusive as to the scope of said provision, nevertheless those facts shed some light on the question as to whether it was intended by the people of the city and by the legislature in adopting and approving the charter provision that the city itself should be subject to the height limitation prescribed in said section 3. We think there is not in that section such a clear and definite expression of the intention so to limit the city in the construction of its public buildings as would remove the provision from the operation of the general rule contended for by the petitioner.

"Let a peremptory writ issue requiring the respondent to sign said contract as directed by the board of public works and as prayed for herein."

It is obvious that the property purchased was for a public street use, to-wit, the widening of Portola Drive.

A reading of the agreement of release and resolution No. 1811, in conjunction with the law applicable, as hereinbefore cited, points to the conclusion that it is the expressed intention of the parties that after January 1, 1950 no further payments should be made by the City and County of San Francisco for upkeep assessments and that if the city did not proceed with said public improvements, and returned any or all of the purchased land to private ownership, then the terms, covenants and restrictions of the St. Francis Homes Association referred to in said agreement and resolution should again attach to said land. I have used the term "expressed intention" purposely, for while it may have been the unexpressed intention of the parties to hold the city liable for such upkeep assessments subsequent to January 1, 1950, neither the agreement nor the resolution so provide, and even if they did so provide, the city could not validly pay such upkeep assessments in view of the law applicable to this case. The result is the same whether the property is acquired by gift, purchase or eminent domain.

You are therefore advised that the City and County of San Francisco is not obligated to pay any upkeep assessments, including the specific one of $311.99 for the year 1950, on the said property owned by it in the St. Francis Homes Association tract, and that it is not subject to any restrictions created by private contract between the several owners of the properties in the said tract.

Very truly yours,

DION R. HOLM,
City Attorney.

TO: EUGENE J. RIORDAN,
Director of Property
375 City Hall, San Francisco 2, Calif.

CWH:

E X H I B I T "A"

AGREEMENT OF RELEASE

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of $1.00, ST. FRANCIS HOMES ASSOCIATION, a California corporation, the first party, hereby bargains and agrees to and with the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, the second party, upon payment to the first party of the sum of $1,723.96, to release the second party from the lien of all assessments of the first party on the hereinafter described real property, for maintenance and upkeep until January 1, 1950, in accordance with the Declarations and Modifications hereinafter referred to.

In consideration of said sum of $1,723.96, the first party further agrees to assume until January 1, 1950 the maintenance of the park strip along the southerly side of Portola Drive in front of the hereinafter described lots and shall also maintain until said date the portions of said lots which shall not be used for widening Portola Drive; provided, however, that the obligation of said association to maintain such portions of said lots shall not begin until said portions of said lots shall have been properly planted to conform with a landscaping scheme which shall be adopted for Portola Drive in front of St. Francis Wood.

Said real property is situated in St. Francis Wood Subdivisions, San Francisco, California, and is more particularly described as follows as per the current block books of the Assessor of the City and County of San Francisco:

A. Lot 1, Block 2987-A; Lot 1, Block 2989-A and Lot 15, Block 3072-A; subject to Declaration dated July 31, 1917, recorded on the same date in Book 1015 of Deeds at Page 344 as amended by Supplemental Declaration dated June 29, 1922, recorded December 31, 1923, in Book 807 of Official Records at Page 146.

B. Lot 1, Block 3069; Lot 1, Block 3070; Lot 1, Block 3071 Lot 14, Block 3072-A; subject to Declaration dated March 21, 1917, recorded March 22, 1917, in Book 980 of Deeds at Page 340 and as modified by agreement dated June 29, 1922, recorded December 31, 1923 in Book 807 of Official Records at Page 148.

C. Lot 25, Block 3071; subject to Declaration dated October 11, 1912, recorded on the same date, in Book 676 of Deeds at Page 153, as amended by supplemental Declaration filed December 5, 1916, in Book 981 of Deeds at Page 123 and as further amended by supplemental Declaration recorded December 31, 1923, in 807 of Official Records at Page 148.

This release shall become effective when said sum of $1,723.96 has been paid to the first party by the second party, title to said lots is vested in the second party and the 1941 and prior assessments of the first party on said property have been paid.

It is agreed by the parties hereto that this release is subject to a condition subsequent: that is, should the City reconvey any portion or portions of said lots or any of them into private ownership, all rights of St. Francis Homes Association pursuant to said declaration and modification therof, including the right to have the effect of said declaration and modification continued beyond January 1, 1950, shall continue the same as if this release had never been executed; provided, however, that it is hereby agreed that the payment herein provided to be made to St. Francis Homes Association shall constitute payment of all assessments that may be levied by St. Francis Homes Association against said lots or any portions thereof for the years 1942 to 1949, both inclusive.

IN WITNESS WHEREOF, the first party has executed this agreement of release in duplicate this 26th day of May, 1941.

ST. FRANCIS HOMES ASSOCIATION,
a corporation,
(SEAL)

By: H. H. MORRIS (PRES.)

By: JOHN CRAIG (SECTY.)

APPROVED:

GROVER O'CONNOR
(GROVER O'CONNOR)
Attorney, St. Francis
Homes Association

APPROVED:

City Attorney

EXHIBIT "B"

LAND PURCHASES - PORTOLA
DRIVE WIDENING
RESOLUTION NO. 1811
(Series of 1939)

RESOLVED, in accordance with the recommendation of the Department of Public Works, that the City and County of San Francisco, a municipal corporation, accept deeds from the following named parties, or the legal owners, to certain lands situated in San Francisco, California, required for the widening of Portola Drive, and that the sums set forth opposite their names be paid for said lots from Appropriation No. 077.923.58:

GARDEN HOMES COMPANY
Lot 1, Assessor's Block
2987-A.....$3,712.00
TIMOTHY SHEA
Lot 1, Assessor's Block
2989-A..... 4,721.97
VERA STRUB
Lot 1, Assessor's Block
3069..... 5,329.80
WESTGATE PARK COMPANY
Lot 1, Assessor's Block
3070 and Lot 1, Assessor's
Block 3071..... 8,969.21
WM. O. STUTTMEISTER
Lot 25, Assessor's Block
3071..... 3,694.95
ANGLO CALIFORNIA NATIONAL
BANK
Lot 15, Assessor's Block
3072-A..... 2,537.66
RALPH C. FEIGE
Lot 14, Assessor's Block
3072-A..... 3,658.37

The above sums cover damages in full to said property, including $1,723.96 as part of the market value of the land for full payment of all assessments to be levied by St. Francis Homes Association, a corporation, on said lots for the period from January 1, 1942 to January 1, 1950, for maintenance and upkeep in accordance with the provisions of that certain Declaration recorded in Book 1015 of Deeds, page 344, and Modification thereof recorded in Book 807, page 148, Official Records of the City and County of San Francisco.

In consideration of the sum of $1,723.96, St. Francis Homes Association shall release the City and County of San Francisco, its successors and assigns, from the lien of all said assessments and shall until January 1, 1950, assume the maintenance of the park

strip along the southerly side of Portola Drive in front of the above described lots and shall also maintain until said date the portions of said lots which shall not be used for widening Portola Drive; provided, however, that the obligation of said Association to maintain such portions of said lots shall not begin until said portions of said lots shall have been properly planted to conform with a landscaping scheme which shall be adopted for Portola Drive in front of St. Francis Wood.

It is understood that the above named Grantors shall pay the 1940-1941 taxes and 1941 assessment of the St. Francis Homes Association and all prior taxes and assessments which may be a lien on said property.

In the event any portions of said lots not required for widening Portola Drive shall be sold by the City and returned to private use said portions shall become subject to the provisions of said Declaration and Modification.

The City Attorney shall examine and approve the title to said property.

Adopted--Board of Supervisors, San Francisco, May 12, 1941.

Ayes: Supervisors McGowan, McSheehy, Mead, Meyer, Ratto, Roncovieri, Schmidt, Shannon, Uhl.
Absent: Supervisors Brown, Colman.

I hereby certify that the foregoing resolution was adopted by the Board of Supervisors of the City and County of San Francisco.

DAVID A. BARRY,
Clerk.

Approved, San Francisco, May 13, 1941.

ANGELO J. ROSSI,
Mayor.

May 15-1t

E X H I B I T "C"

PORTOLA DRIVE WIDENING - ST. FRANCIS HOMES ASSOCIATION ASSESSMENTS.

WHEREAS, the City and County of San Francisco is the owner of the following described real property situated in San Francisco, California, acquired for the proposed widening of Portola Drive:

Lot 1 in Block 2987-A, Lot 1 in Block 2989-A, Lots 1, 13, 14 and 15 in Block 3069, Lot 1 in Block 3070, Lots 1 and 25 in Block 3071, also Lots 14 and 15 in Block 3072-A, as per the current Block Books of the Assessor of the City and County of San Francisco; and

WHEREAS, title to said parcels of real property was accepted by the City subject to the lien of assessments of the St. Francis Homes Association, a California corporation, for maintenance and upkeep of the St. Francis Wood Subdivisions; and

WHEREAS, on May 12, 1941, the Board of Supervisors adopted Resolution No. 1811, Series of 1939, which resolution was approved by the Mayor on May 13, 1941, whereby the City paid all such assessments on the above described land for the period from January 1, 1942, to January 1, 1950; and

WHEREAS, the Director of Property has received a bill from said association for upkeep assessments on said property for the calendar year 1950 in the total sum of $311.99;

NOW, THEREFORE, BE IT RESOLVED, in accordance with the recommendation of the Department of Public Works that said bill in the sum of $311.99 be paid from Appropriation No. 977.923.58.

RECOMMENDED:

DESCRIPTION APPROVED:
E.J.C.

FORM APPROVED:
DION R. HOLM, City Attorney

EUGENE J. RIORDAN
Director of Property

RALPH G. WADSWORTH
City Engineer

By WALTER A. DOLD
Deputy City Attorney

SHERMAN P. DUCKEL
Director of Public Works

$311.99 Available

APPROVED:

Appropriation No. 977.923.58

T. A. BROOKS
Chief Administrative Officer

Controller

EXHIBIT "D"

February 3, 1950

City and County of San Francisco,
City Hall,
San Francisco, California

Attention Mr. Eugene J. Riordan,
Director of Properties.

Gentlemen:

We are enclosing herewith in triplicate the Upkeep Assessment statement for the calendar year 1950 on the following described city owned lots in St Francis Wood, identified by their respective Assessor's lot and block numbers:

LOT	BLOCK	ASSESSMENT
1	3069	$46.98
13	3069	22.17
14	3069	22.41
15	3069	21.84
1	3070	30.62
1	3071	36.22
25	3071	27.77
14	3072A	22.56
15	3072A	19.60
1	2989A	31.63
1	2987A	30.19

These assessments, tablished on the basis of $.005 per square foot of area per year, now become payable by reason of the fact that the Covenants and Conditi ns, to which these properties are subject, have been extended for a further period of twenty years as of January 1, 1950. Previous assessments were paid in a lump sum by the City through the calendar year 1949, the termination date of the original declaration.

Very truly yours,

/s/ John Craig
John Craig,
Secretary,
ST. FRANCIS HOMES ASSOCIATION

Enc.

OPINION No. 221
August 3, 1950

SUBJECT: WHETHER PRESIDENT (CHAIRMAN) OF CONSOLIDATED RECREATION AND PARK COMMISSION IS EX-OFFICIO MEMBER OF ART COMMISSION.

Gentlemen:

I have your request for an opinion as follows:

> "On July 1, 1950 the Recreation and Park Commission under section 40, 41 and 42 of the Charter, as amended, became the successor to the former separate Recreation Commission and Park Commission.
>
> "Section 45 of the Charter provides that the Chairman of the Park Commission shall be an ex-officio member of the Art Commission.
>
> "An opinion is respectfully requested as to whether the President of the Recreation and Park Commission is or is not an ex-officio member of the Art Commission."

O P I N I O N

You will note that Section 40 of the Charter, as amended, provides that "The recreation and park department and the recreation and park commission shall be, respectively, the successors in all regards of the recreation department and the park department and of the recreation commission and the park commission." (Emphasis added). Thus, the consolidated commission succeeds in all respects to the functions and duties of the separate commissions, and as one of the functions of the chairman of the park commission was to serve by virtue of his office as a member of the Art Commission under Section 45 of the Charter, the chairman of the consolidated commission by virtue of the above underscored language succeeds to this particular function.

You are therefore advised that it is my opinion that the President of the Recreation and Park Commission is an ex-officio member of the Art Commission.

Respectfully submitted,

TJB

DION R. HOLM
City Attorney

TO: Recreation and Park
Commission, Attention
Mr. Edward A. McDevitt, Secy.

cc: Recreation and Park Department
Art Commission
Attention Mr. Joseph H. Dyer, Secy.

Opinion No. 222
August 3, 1950

SUBJECT: LIABILITY OF UNIFIED SCHOOL DISTRICT FOR DAMAGE TO PROPERTY ARISING OUT OF NEGLIGENCE OF ITS EMPLOYEES.

Dear Sir:

This office is in receipt of a request from you for an opinion which reads as follows:

> "Will you please favor me with your opinion regarding the claim of Mr. Jack Hong, a student of Commerce High School, for damage to personal property.
>
> "According to information furnished to us, (1) the claimant entrusted his chronometer type watch to the care of a San Francisco Unified School District Instructor during a swimming class, (2) the instructor negligently permitted the watch to come into contact with the salt water of the pool thereby causing damages to the extent of $32.50.
>
> "Attached is our file on the matter for your convenience."

O P I N I O N

It is my opinion that Mr. Hong has a valid claim against the San Francisco Unified School District.

Section 1007 of the Education Code of the State of California (formerly Section 2.801 of The School Code of the State of California) reads as follows:

> "Liability for negligent injury to person or property: Claim: Filing time and contents. The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after the accident has occurred. The claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

The language of the Code is clear and obviously covers the instant matter.

As would be expected, the overwhelming number of cases interpreting and applying the aforesaid code section deal with personal injuries.

See: AHERN v. LIVERMORE UNION HIGH SCHOOL DIST., 208 Cal. 770; BELLMAN v. SAN FRANCISCO HIGH SCHOOL DISTRICT, 11 Cal. (2) 576, 81 Pac. (2) 894; BRIDGE v. BOARD OF EDUCATION, 2 Cal. App. (2) 398, 38 Pac. (2) 199; MAEDE v. OAKLAND HIGH SCHOOL DIST., 212 Cal. 419, 298 Pac. 987; HENRY v. GARDEN GROVE UNION HIGH SCHOOL DIST., 119 Cal. App. 638; FREUND v. OAKLAND BOARD OF EDUCATION, 28 Cal. App. (2) 246.

It is to be noted that no file was attached to your request. I assume that the instant claim was properly filed within the requirements of the aforesaid Section 1007 of the Education Code.

Obviously, from the facts stated in your communication, the instructor was acting within the scope of his employment, since at the time of his negligent act he was engaged in the work he was employed to perform, during his working hours. Therefore, the School District is liable for the damage caused by the negligence of said employee, and you are advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

DJK

To: Mr. Harry D. Ross,
Controller.

cc: Mr. Irving G. Breyer,
Legal Adviser,
93 Grove Street, 4th Floor,
San Francisco 2, California.

No. 223

August 3, 1950

SUBJECT: PARKING FEES - MEMBERS OF THE BOARD OF EDUCATION - COMPENSATION.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "May I request your opinion relative to the legality of reimbursing members of the Board of Education for parking fees incurred while in attendance at board meetings."

O P I N I O N

Section 134 of the charter provides:

> "The Compensation of each member shall be fifteen dollars ($15.00) per day when the board is in session and ten dollars ($10.00) per day when engaged in committee work under the direction of the board."

The foregoing language of the charter is explicit in stating the compensation to be paid the members of the board while they are in attendance at meetings. No payment in excess of the foregoing stated sums is authorized by the language of the quoted section of the charter.

The matter of compensation to be paid members of the Board of Education while engaged in official duties was the subject of two opinions rendered on October 2, 1933, and October 5, 1933, by my predecessor, Mr. John J. O'Toole. These opinions express the conclusion that no payment to a member of the Board of Education as compensation for participation at a board meeting or a committee meeting in excess of $15.00 or $10.00, respectively, is authorized by §134 of the charter. I concur in these opinions.

You are advised that §134 of the charter does not authorize you to reimburse members of the Board of Education for parking fees incurred while in attendance at board meetings.

Respectfully yours,

DION R. HOLM, City Attorney

TO:
MR. HARRY D. ROSS,
Controller.

LTK

OPINION NO. 224

August 3, 1950

SUBJECT: RECORDS OF BLOOD TESTS; LENGTH OF TIME MUST BE KEPT.

Dear Sir:

We have your request for an opinion as follows:

> "The Laboratory would like to have clarification on the length of time that it is legally necessary to keep it's records, (blood tests and etc.,). Does it make any difference whether these records are on legal (Jail) cases or purely diagnostic."

O P I N I O N

Section 328, Part I, of the Municipal Code, at page 48, provides as follows:

> "SEC. 328. Destruction of Useless Papers. Any department head as defined in Section 20 of the Charter is authorized to destroy or otherwise dispose of useless papers of such department five (5) years after receipt thereof and after they have served their purpose and are no longer required. The Controller shall approve for such department the destruction or preservation of papers relating to financial matters. The City Attorney shall also instruct department heads on destruction of papers which may have legal significance. The Retirement Board shall supervise the destruction or preservation of payroll checks, time cards, etc., and on request, payrolls, time cards, etc. shall be delivered to said Retirement Board."

The foregoing Municipal Code provisions appear to be self-explanatory. If the records are more than five years old, and are no longer required, they may be destroyed. You are also advised that no difference is to be noted concerning records as to whether they are in regard to legal jail cases or are purely diagnostic, if they meet the above requirements.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Department of Health

SDL

OPINION NO. 225

August 25, 1950

SUBJECT: SCHOOL BOND PROJECTS - FIRE AND PANIC SAFETY - CONFLICT BETWEEN SAN FRANCISCO BUILDING CODE AND STATE REGULATIONS.

Dear Sir:

I have your request for an opinion regarding Title 21 of the CALIFORNIA ADMINISTRATIVE CODE entitled "Public Works." You state:

> "San Francisco Schools are now being designed to conform with the Fire and Panic Requirements of Title 21, which includes Rules and Regulations of the State Fire Marshal and the Uniform Building Code of the Pacific Coast Building Conference, and the Fire Code of San Francisco.
>
> "Since the fire and panic safety of any building in San Francisco is the direct responsibility of the San Francisco Fire Department, it would seem that strict compliance to the San Francisco Building Code (which includes the Fire Code) would be sufficient, and that the additional requirements imposed by Title 21 are not necessary. There is considerable expense involved, in some cases, in complying with the additional Fire and Panic Regulations.
>
> "Since the question involved is of a legal nature, an opinion from your office is requested regarding the necessity of complying with the Fire and Panic Safety requirements of Title 21 in addition to the San Francisco Building Codes. Your opinion would govern all future School Bond Projects that are processed through this Department."

O P I N I O N

In my opinion it is necessary that San Francisco schools be constructed in accordance with the requirements of the "fire and panic safety" provisions of Title 21 in addition to those of the San Francisco Building Code. Subchapter 1 of Title 21 deals with the Division of Architecture (which is a division within the State Department of Public Works). Group 1 under subchapter 1 is entitled "Safety of Construction of Public Schools." Section 21 thereof provides:

> "21. FIRE AND PANIC SAFETY. Plans and specifications shall provide safety from explosions, fires, or panics during and following earthquakes. Safe and ample channels of egress shall be provided.

"The Division of Architecture will use the Rules and Regulations of the State Fire Marshal, and the Uniform Building Code of the Pacific Coast Building Officials Conference as a guide for such safety requirements.

"If plans are submitted for existing buildings containing variations from such safety requirements, the Division of Architecture may require the architect or structural engineer to submit with the plans a statement demonstrating that the variations will not jeopardize the safety of the occupants. A copy of this statement shall also be forwarded to the school board."

The authority of the Division of Architecture to make such rules and regulations is found in section 18202 of the CALIFORNIA EDUCATION CODE, which reads:

"Section 18202. RULES AND REGULATIONS. The Division of Architecture may from time to time make such rules and regulations as it deems necessary, proper, or suitable effectually to carry out the provisions of this article."

Section 18191 of the EDUCATION CODE requires that the Division of Architecture "shall supervise the construction of any school building." Section 18194 requires that the Division of Architecture "shall pass upon and approve or reject all plans for the construction or alteration of any school building," and further requires that the governing board of any school district, before adopting any plans for a school building, "shall submit the plans to the Division of Architecture for approval." No contract for construction of a school building can be let until the Division of Architecture has given its "written approval of the plans as to safety of design and construction" (EDUCATION CODE, sec. 18195), and no such contract is valid without such approval and without compliance in every particular with the requirements prescribed by the Division of Architecture. (EDUCATION CODE, sec. 18200).

These provisions of state law are binding because "it is clear that in its conduct of its school affairs the city and county of San Francisco is subject to and is controlled by general law and in all matters of conflict the general law must prevail." (ESBERG v. BADARACCO, 202 Cal. 110, 118; BUTTERWORTH v. BOYD, 12 Cal. (2d) 140, 152; WHITMORE v. BROWN, 207 Cal. 473, 477.) "The school system of the state is a matter of general concern, as distinguished from a municipal affair." (LANSING v. BOARD OF EDUCATION, 7 Cal. App. (2d) 211, 213; ESBERG v. BADARACCO, supra.) "The state undoubtedly might

provide in the exercise of its police power and under a general law, for a complete system of regulation for the protection of the public health, safety and comfort in the erection of school buildings." (PASADENA SCHOOL DISTRICT v. PASADENA, 166 Cal. 7, 12)

In the area where no conflict with state laws or regulations of the Division of Architecture exists, school buildings must be constructed in accordance with the requirements of the San Francisco Building Code. (PASADENA SCHOOL DISTRICT v. PASADENA, 166 Cal. 7, 11)

But wherever there is any conflict between the San Francisco Building Code and the "fire and panic safety" requirements of Title 21 of the California Administrative Code, the latter requirements prevail and must be met.

You are therefore advised that it is necessary to comply with the "fire and panic safety" requirements of Title 21 in addition to the requirements of the San Francisco Building Code.

It is, of course, conceivable that in certain circumstances a state administrative regulation might be so arbitrary and unreasonable as to be invalid, just as a statute might be invalid. There is nothing in the facts you state that would bring this principle into play, however.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Mr. Sherman P. Duckel
Director of Public Works

Through: Mr. Thomas A. Brooks
Chief Administrative Officer

GEB

Opinion 226
August 9, 1950

SUBJECT: BID ON CONTRACT FOR PARKSIDE LIBRARY; REJECTION OF BID FOR OMISSION OF EXPERIENCE QUALIFICATION, WHICH INCLUDED AFFIDAVIT.

Dear Sir:

This office is in receipt of a request for an opinion which reads as follows:

R E Q U E S T

"On Wednesday, July 26, 1950, I received and opened bids for the construction of the Parkside Library. Eight bids were received for the work, the lowest of which, in the amount of $127,402, being submitted by Ira H. Larsen Co., 64 South Park, San Francisco 7.

"This bid contained no affidavit and, consequently, I announced at the meeting after I had read the bid that I believed it was irregular and that I would submit the same to the City Attorney for an opinion. The next day the Ira H. Larsen Co. mailed an affidavit to me and I enclose it herewith together with their letter of transmittal.

"I would therefore request your opinion if I must reject the bid of the Ira H. Larsen Co. because of the above-described omission.

"Your opinion is requested prior to August 10, 1950 so that I may make the award for the work within the 20 days limit proscribed.

"Paragraph 3 of Section No. 36 of the Public Works Code covers the filing of bids."

O P I N I O N

The "Invitation for Proposals" reads in part as follows:

"Office of the Department of Public Works of the City and County of San Francisco, July 7, 1950.

"Sealed proposals will be received at the office of the Director of Public Works, at Room 282, City Hall, between the hours of 1:30 p. m. and 2:30 p. m. on Wednesday, the TWENTY-SIXTH DAY OF JULY, 1950, for the following public work, to-wit:

"GENERAL CONSTRUCTION OF THE PARKSIDE BRANCH LIBRARY, TARAVAL STREET & TWENTY-SECOND AVENUE. JOB NO. 844.

"Said work must be done in accordance with the plans and specifications therefor on file in the office of the Department of Public Works, to which reference is hereby made and within the time set in said plans and specifications.

"All proposals must be made on the proposal form furnished the bidder and proposal must be attested by either a Notary Public or the Director of Public Works."

. . . . . .

"If bid is mailed, address it to the 'Director of Public Works, Room 260, City Hall, San Francisco, California,' prior to bid opening, otherwise the bid must be presented personally by the bidder in Room 282, City Hall, at the day and hour specified in Notice of Advertisement. If bid is mailed, type in lower left corner of envelope the name of job being bid."

. . . . . .

"The Director of Public Works reserves the right to reject any and all bids."

Section 99 of the Charter of the City and County of San Francisco provides in part as follows:

"The board of supervisors shall, by ordinance, establish the necessary procedure to be followed in the advertising for bids, the award of contracts ..."

Section 36 of the San Francisco Public Works Code (being Section 8 of San Francisco Ordinance 4792 [Series of 1939])dealing with public contract procedure, provides as follows:

"All bids shall be filed on forms furnished by the department head concerned, and all bids not so filed shall be rejected. All bids received as herein provided shall be publicly opened by the proper department head or officer at the time and place to be stated in the advertisement for proposals, and after tabulation bidders may inspect the bids. Bids with alterations or erasures therein shall be rejected."

The forms furnished by the Department of Public Works for bids for the job in question, and in all public contracts falling within its jurisdiction, including the following affidavit to be executed by the bidder.

"STATE OF CALIFORNIA)
City and County of San Francisco) ss

_____, being duly sworn, says:
That he is _____
the bidder who makes the foregoing proposal or bid. That said bidder has not, nor have any of his agents, officers, representatives, or employees, been guilty of collusion

with any officer or representative of the City and County of San Francisco, or with any other party or parties in the submission of the foregoing bid or proposal, nor has said bidder, his agents, officers, representatives, or employees, or either of them, prevented any bid being made for the furnishing of the materials or services mentioned in the above proposal or bid, nor has said bidder knowingly received any preferential treatment by any officer or employee of the City and County in the matter of making or submitting the aforesaid bid or proposal; and that the foregoing statement of experience and all statements therein contained are true and correct.

"Subscribed and sworn to before me
this_____day of_____,1950

(SEAL)_____
Notary Public
In and for the City and County of
San Francisco, State of California

_____
Director
Dept. of Public Works of the
City and County of San Francisco,
State of California."

The reason for requiring such affidavit is found in Section 100 of the Charter of the City and County of San Francisco, which reads:

"SECTION 100. If any party or parties to whom a contract has been awarded has been guilty of collusion with any officer or representative of the city and county, or any other party or parties, in the submission of any bid or in preventing of any other being made, or in knowingly receiving preferential treatment by any officer or an employee of the city and county, then any contract so awarded, if not completed, may be declared null and void by the board of supervisors on the recommendation of the purchasing agent or the department head concerned, as the case may be, and the purchaser of supplies or the department head concerned shall thereupon readvertise for bids for said work for the uncompleted portion thereof. If the work under such contract shall have been completed, the matter shall be referred to the city attorney for such action as may be necessary. Any party or parties guilty of such collusion shall not be permitted to participate in or to bid on any future public work, improvement or purchase to be made by the city and county."

The identical problem was raised in the case of Nicholas Crowley v. H. C. Vensano as Director of the Department of Public Works of the City and County of San Francisco, a municipal corporation, Superior Court No. 387460. In the Crowley case, as in the instant case, the petitioner was the low bidder but failed

to execute the affidavit. The time for closing bids in the Crowley case was 2:30 P. M. and shortly thereafter the bids were opened, and it was discovered that the affidavit was not signed. The representative of the petitioner signed the affidavit. Daniel R. Shoemaker, Judge of the Superior Court, held the Crowley bid to be invalid and denied the petition for writ of mandate and discharged the alternative writ of mandate which had been issued.

See also Stimson v. Hanley, 151 Cal. 379, wherein the Supreme Court held it was proper to reject a bid which "was not in response to the invitation." To the same effect State ex rel Shaw v. City of Trenton, 12 Atl. 902; McGovern v. City of Trenton, 86 Atl. 539.

It appears from the cases cited, and in particular the Crowley case, which is directly in point, that the experience qualifications, which include the affidavit quoted above, are an indispensable part of the proposal or bid; and that the failure to include these forms is fatal.

You are therefore advised that in view of the defect in the bid of the Ira H. Larsen Company you must, under existing law, reject this bid.

Respectfully submitted,

DION R. HOLM
City Attorney

RJB

To: Mr. Sherman Duckel

No. 227

August 10, 1950

SUBJECT: POWER OF BOARD OF EDUCATION TO RAISE SALARIES OF EMPLOYEES ON CHILD WELFARE CENTERS AFTER JULY 1st.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"The Board of Education at its meeting of August 2 requested that I obtain your opinion on the following matter:

"Under date of June 29, 1950, the Board of Education at its regular meeting adopted by resolution a salary schedule for Child Care Center employees for the school year 1950-51 effective July 1, 1950. This salary schedule sets forth specifically the salaries to be paid all Child Care Center employees.

"The Board of Education at its meeting of August 2, 1950, had under consideration the adoption of the annual budget for the operation of the school district which includes the budget for Child Care Centers. Upon the request of representatives of the Child Care Center employees organization, the Board of Education directed that the sum of approximately $29,000.00 be added for the purpose of raising the salary schedule for these employees. During the month of July, 1950, and at the present time these employees have been paid in accordance with the rates adopted by the Board which were effective July 1, 1950.

"I informed the Board members that I had serious doubt, in view of a previous opinion of the City Attorney's, that the salary schedule for the year 1950-51 could be revised after the commencement of the school year, that is, July 1, 1950.

"The question upon which we desire your opinion is whether or not the opinion of the City Attorney referred to hereinabove that the Board of Education may revise its salary schedule up to the commencement of a new school year, is likewise applicable to the salary schedule adopted for Child Care Center employees. As far as our Civil Service employees are concerned, our salary schedule for these employees is adopted in accordance with the provisions of the

Charter of the City and County of San Francisco.

"If it should be your opinion that the Board of Education may change its salary schedule after the commencement of the school year, we would desire your opinion on the further question as to whether or not we can make the revised schedule applicable retroactively to July 1, 1950, for services which have already been rendered under the previous schedule.

"An early reply to this request will be appreciated by the Board of Education in order that it may plan its budgetary affairs in accordance with the conclusion reached."

O P I N I O N

It is my opinion that the Board of Education may not increase the salaries of employees of the Child Care Centers as proposed.

Sections 19602, et seq. of the Education Code of the State of California give to the Board of Education the authority to establish said Centers.

Section 13803 of said Education Code reads as follows:

"§13803. Fixing salaries by city boards of education. City boards of education shall have full power to fix the salary of all employees."

Obviously the employees of the Child Care Centers are "employees" within the meaning of said section 13803.

Section 135 of the charter of the City and County of San Francisco provides, in part, as follows:

"The board shall also have power to employ such teachers and other persons as may be necessary to carry into effect its powers and duties; to fix, alter and approve their salaries and compensations, except as in this charter otherwise provided,...."

This section of said charter being in pursuance of the authority granted by said section 13803 of the Education Code is unquestionably constitutional.

See: Anderson v. Board of Education, 126 Cal. App. 514;

Butterworth v. Boyd, 12 Cal. 2d, 140, 152.

Section 135 of said charter further provides:

> "The board shall, between the 1st and 21st days of May of each year, adopt a schedule of salaries for the next ensuing fiscal year for teachers and other employees of the school department. Compensations of non-teaching and non-technical employees shall be fixed in accordance with the salary standardization provisions of this charter."

The obvious purpose of that paragraph is to provide for, and assure, a timely determination of the salary status of employees by the beginning of the fiscal year. This purpose will only be accomplished by holding said provision to be mandatory in nature with regard to the fixing of salaries by July 1st. The opinion of former City Attorney John J. O'Toole, rendered May 20, 1937, is to the same effect.

See: Pulcifer v. County of Alameda, 29 Cal. 2d, 258, 262.

The power to fix a salary rate does not include the power to change the rate after the time when the power to set the rate must be exercised (see: Pulcifer v. County of Alameda, supra).

The contract of employment having already been entered into with the employees of the Child Care Centers at specified salaries, said contract, in the absence of obvious error, cannot be altered. It is to be noted that although this principle of law prohibits raising of salaries during the fiscal year, by the same token it protects employees by forbidding the lowering of salaries during said period.

See Aebli v. Board of Education, 62 Cal. App. 2d 706;

Abraham v. Sims, 2 Cal. 2d 698, 711.

It is therefore my opinion, and you are advised accordingly, that the Board of Education may not now increase the rate of pay for said employees during the present fiscal year.

Respectfully submitted,

DJK

DION R. HOLM
City Attorney

To: Board of Education
Attn: Mr. Irving G. Breyer

Opinion No. 228
August 11, 1950

SUBJECT: PAYMENT OF COMPENSATION OF MEMBERS OF THE REDEVELOPMENT AGENCY.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Will you please prepare the proper action for presentation to the Board of Supervisors to authorize the Redevelopment Agency of the City and County of San Francisco to pay its members a fee for the attendance at meetings, such fee to be at the rate of $10.00 per meeting, not to exceed $500.00 per member per year."

O P I N I O N

Section 21 of the Community Redevelopment Act, Act 1500, reads in part as follows:

"Members shall receive their actual and necessary expenses, including travelling expenses incurred in the discharge of their duties and may receive such other compensation as the legislative body may prescribe or authorize."

"Legislative body" is defined in Section 9 of the Act as being "the city council, board of supervisors or other legislative body of a community".

Section 21 of the Act also provides for the appointment of five resident electors of the community as members of the Agency. Information at hand reveals that $2,500.00 has been appropriated by the Board of Supervisors pursuant to Section 26 of the Act for the compensation of the members of the Agency.

The following ordinance is suggested for your consideration and if it meets with your approval it should be presented by the Agency to the Clerk of the Board of Supervisors for appropriate legislative action:

"The compensation of the appointive members of the Redevelopment Agency of the City and County of San Francisco, exclusive of actual and necessary expenses, including travelling expenses, shall be $10.00 per meeting for each meeting of the Agency actually attended by said members, provided that the aggregate amount paid to any one member shall not exceed $500.00 per year, and the

aggregate amount paid all the members shall not exceed $2,500.00 per year." (Enactment of the foregoing should be by ordinance and not by resolution - a copy of the proposed ordinance is inclosed.)

You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

CWH

To: Mr. James E. Lash, Director
Redevelopment Agency

PROVIDING FOR THE PAYMENT OF COMPENSATION TO MEMBERS OF THE REDEVELOPMENT AGENCY; FIXING THE AMOUNT AND MAXIMUM THEREOF.

FILE NO._____ ORDINANCE NO._____

(Series of 1939)

Be it ordained by the people of the City and County of San Francisco:

The compensation of the appointive members of the Redevelopment Agency of the City and County of San Francisco, exclusive of actual and necessary expenses, including traveling expenses, shall be $10.00 per meeting for each meeting of the Agency actually attended by said members, provided that the aggregate amount paid to any one member shall not exceed $500.00 per year, and the aggregate amount paid all the members shall not exceed $2,500.00 per year.

No. 229

August 10, 1950

SUBJECT: TRANSFERRING OF MONEY TO GENERAL FUND BY TAX COLLECTOR FROM SPECIAL FUND.

Dear Sir:

I have your request for an opinion as follows:

"Pursuant to Sec. 3696.5, Subdivision 'b' of the 'Revenue and Taxation Code', I have deposited money in a refund account with the Treasurer dating back to 1947. No application for refund nor any refund has been made of this money.

"The Controller wants my authorization in writing to him to transfer this money to the general fund. I am unable to find any section in the Revenue and Taxation Code pertaining to a statute of limitations on the above code section. I would appreciate your opinion as to what this period is."

O P I N I O N

My opinion is that the three-year period of limitation provided by CODE OF CIVIL PROCEDURE, §338, subd. 1, applies.

Sections 3696 and 3696.5 of the REVENUE AND TAXATION CODE provide:

"§3696. APPLICATION FOR SALE: DEPOSIT FOR COSTS. Before a sale of tax-deeded property at public auction on application of a prospective purchaser is made, a prospective purchaser shall make a written application to the tax collector asking that the property described in the application be offered for sale. The tax collector shall demand in advance a deposit from the applicant of a sum sufficient to defray the cost of advertising."

"§3696.5. OBJECTION BY TAXING AGENCY: WITHDRAWAL OF APPLICATION: RETURN OF DEPOSIT: WHEN AUTHORIZED. If a taxing agency objects to the sale, the tax collector shall so notify the applicant, and he may withdraw his application before the sale. The entire deposit shall be returned to the applicant if:

"(a) The property or any portion thereof is redeemed or payments under an installment payment plan are commenced before the sale.

"(b) The applicant fails to secure the property on his bid at the sale.

"(c) After the objection of a taxing agency to the sale, the applicant withdraws his application before the sale or the tax collector excludes the property from the sale.

"(d) A taxing agency objects to the sale and before the date of sale applies to purchase the property under Chapter 8 of this part.

"(e) A taxing agency or revenue district objects to the sale and applies to purchase a portion of the property; provided, however, that if the applicant in writing directs the tax collector to proceed with the sale of the remaining portion the tax collector shall do so and retain the deposit, in which event, if the publication of notice of intended sale has been commenced or the notice mailed, it shall not be necessary to publish or mail a new notice.

"(f) The property is excluded from the sale by the tax collector either before or after the notice is published."

Sections 335 and 338, subdivision 1, of the CODE OF CIVIL PROCEDURE provide:

"§335. PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:"

"§338. /WITHIN THREE YEARS./ Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

The obligation to return the deposit of advertising expenses is created by statute, to wit, by REVENUE AND TAXATION CODE, §3696.5. No special statute of limitations governs. Therefore, CODE OF CIVIL PROCEDURE, §338, subd. 1, applies.

The six months period of limitation on actions for refunds of taxes paid (REVENUE AND TAXATION CODE, §§5103 and 5138) is, of course, not relevant because the deposit to defray advertising expense of a tax sale is not a tax.

Respectfully submitted,

DION R. HOLM,
City Attorney.

To: Mr. Edward F. Bryant,
Tax Collector.

cc: Mr. Harry D. Ross, Controller,
Mr. John J. Goodwin, Treasurer,
Mr. Wm. Pohlmeier, Controller's Office.

GEB

Opinion No. 230
August 24, 1950

SUBJECT: WITHDRAWAL OF APPLICATION FOR CITY PLANNING COMMISSION; RIGHT TO FILE NEW APPLICATION WITHIN A YEAR AFTER SUCH WITHDRAWAL.

Gentlemen:

This office is in receipt of a request for an opinion as follows:

REQUEST

"This is to request your opinion concerning the authority of the City Planning Commission, in connection with a request by an applicant to withdraw his application for a change of use district classification. The application was filed, published, posted and heard in accordance with the applicable provisions of the Charter and the City Planning Code of the City and County of San Francisco.

"Many persons participated in the public hearing, in the course of which the applicant offered stipulations that would have restricted, to a degree, the use to which the property could be put if the Commission approved the change. After the hearing the matter was taken under advisement by the Commission.

"One week later prior to any decision on the merits of the matter by the City Planning Commission, the applicant presented in writing to the City Planning Commission a request to withdraw his application, "without prejudice".

"In connection with such a request to withdraw, the City Planning Commission desires an opinion from you as to the following questions:

"1. Does the City Planning Commission have authority to grant to an applicant permission to withdraw his application for change of use district classification, without acting on the merits of the matter? In other words, is the City Planning Commission required by law either to approve or to disapprove an application?

2. If the City Planning Commission has authority to grant a request for withdrawal of such an application and does grant such a request, can a new application for change of use district classification similar in substance to the withdrawn application be filed at any time, or must an applicant wait one year before filing again?

3. What would be the respective legal effect of including, in the motion or resolution granting such a request -

   (a) the words "without prejudice" or
   (b) the words "with prejudice",

   upon the period within which no such new application may be filed?

"As this is a matter of urgent importance, the City Planning Commission requests that you give this matter your prompt consideration."

OPINION

Answer to Question 1:

The right of the City Planning Commission to permit an applicant to withdraw his application for change of use district classification without acting on the merits, was discussed in an opinion of my predecessor on April 15, 1934, a copy of which is attached hereto. At that time the City Planning Commission was advised that the Commission had the right to permit the withdrawal of such an application.

I am in accord with the conclusion reached in that opinion and therefore you are advised that the City Planning Commission does have the right to permit an applicant to withdraw his application for change of use district classification without acting on the merits of the application.

Answer to Question 2:

Section 117 of the charter provides in part as follows: ". . . that in case of disapproval by the commission or by the supervisors on appeal of a proposed change, such proposed change may not be resubmitted to or reconsidered by the commission for at least one year."

The only restriction on the resubmission of an application for zone change or the reconsideration of an application of zone

change by the commission set forth in Section 117 is in the situation where the Commission, or the Board of Supervisors on appeal, has disapproved the proposed change. Where the City Planning Commission has granted permission to an applicant to withdraw his application, there will have been no disapproval by the Commission or the Board of Supervisors of the proposed change and, therefore, there would be no restriction on the resubmission of the application or the reconsideration of the matter by the Commission within the year.

You are therefore advised that where the City Planning Commission has granted permission to withdraw an application, a new application for change in use district classification similar in substance to the withdrawn application may be filed at any time thereafter.

Answer to Question 3:

As stated above, the only restriction on the right to resubmit an application or on the right of the Commission to reconsider an application for a proposed change of zone is where the Commission or the Board of Supervisors have disapproved the proposed change. I do not believe, therefore, that the City Planning Commission could, where it granted the request to withdraw application, restrict the right of the applicant to file a new application similar in substance to the withdrawn application within the period of one year.

If the Commission feels that no similar application should be filed within a year, the Commission should refuse to permit the withdrawal of the application and proceed to decide the matter on the merits. A disapproval of the application would preclude the filing of a similar application within a year. The commission cannot achieve this end by ordering the withdrawal "with prejudice."

You are therefore advised that if the Commission grants the applicant the right to withdraw his application, it cannot in any way restrict the right of the applicant to file a new application similar in substance within a year.

Respectfully submitted,

DION R. HOLM
City Attorney

To: City Planning Commission
Attn: Paul Opperman, Director

LSM

April 5, 1934

SUBJECT: Withdrawal or dismissal of application for Zone Change.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"On February 24, 1934, an application was filed with the City Planning Commission to re-zone from the Second Residential District to the Commercial District, the northerly side of Chestnut Street, commencing at a point 88 feet 9 inches westerly from Scott Street, and running thence westerly 130 feet.

"The hearing on this matter was set for April 5, 1934, and notice was published in the official newspaper, notices were posted throughout the district and property owners notified by mail.

"On April 2, 1934, a communication was received by this Commission, signed by the attorney for the applicant, stating that the application was withdrawn.

QUERY

"1. Has the City Planning Commission the right to allow the application to be withdrawn?

2. Can the City Planning Commission continue with the hearing, and act on the application?"

OPINION

Section 117 of the Charter provides that the City Planning Commission shall consider and hold hearings on proposed changes in the classification of the use to which property may be put on its own motion or on the application of the interested property owner. The Section further provides that the Supervisors shall, by ordinance, establish procedure for action on such matters.

The Supervisors, in passing the procedural ordinance, failed to make mention of the withdrawal or dismissal of applications for zone changes. We are therefore left with an interpretation of Section 117 in order to reach a conclusion with respect to your questions.

It is a general rule that an applicant or petitioner may withdraw his application or petition prior to action by the body to whom the petition or application has been directed. Such is the practice in the courts of this State.

The first paragraph of Section 117 of the Charter provides that the Commission shall take action on its own motion or on the application of the interested property owner. Thus we find that there are two methods by which action may be taken. The withdrawal or dismissal of an application or petition does not preclude the Commission from re-zoning the property described in the application for it may do so upon its own motion. I believe, however, that if the Commission should permit the withdrawal of the present application there will be nothing before it to consider and, if such withdrawal were granted, the Commission would have to initiate the proceedings anew on its own motion.

However, if the Commission should refuse to permit the withdrawal of the present application it might proceed with the hearing notwithstanding that the applicant had asked permission to withdraw it for when the re-zoning machinery has been set in motion the matter may be carried to a conclusion irrespective of the wishes of the applicant.

Respectfully,

_____
City Attorney

To the -
City Planning Commission

No. 231

August 25, 1950

SUBJECT: COLUMBIA SQUARE--TRANSFER TO BOARD OF EDUCATION

Gentlemen:

This will acknowledge receipt of your request for an opinion as follows:

"The Recreation and Park Commission in considering the future use of Columbia Square would appreciate your advice on several questions.

"The Bay Shore Freeway will soon displace the Father Crowley Playground at Seventh and Harrison Streets. The Commission believes that Columbia Square, also at Seventh and Harrison Streets, if redeveloped would be a suitable playground for children in the surrounding neighborhood, which is highly industrial in character.

"However, full development of the playground would prove costly if the neighborhood pattern changes, as predicted, and families move away because of the freeway, leaving a playground that would not be patronized.

"The Board of Education has asked that Columbia Square be transferred to its jurisdiction for constructing a school building and a schoolyard playground.

"The questions on which the Commission requests your advice are:

"1. Can the Recreation and Park Commission legally transfer title to Columbia Square to the Board of Education provided that Board agrees to operate the schoolyard thereon for recreational purposes?

"2. Can the Recreation and Park Commission lease Columbia Square to the Board of Education provided that Board agrees to operate the schoolyard thereon for recreational purposes?

"3. If the Recreation and Park Commission can transfer or lease Columbia Square to the Board of Education, by what regular process should the transfer or lease be effected?

"4. If the Recreation and Park Commission cannot transfer or lease Columbia Square to the Board of Education

can it abandon the land in accordance with the provisions of the Park Abandonment Law of 1927 for the purpose of placing the land under the Board of Education for school and recreational purposes?"

O P I N I O N

In answer to the first question, your attention is invited to the opinion of my predecessor dated March 25, 1948, rendered to the Board of Park Commissioners, in which it was specifically held that a schoolhouse could not be erected on Portsmouth Square because of limitations placed upon the Park Commission by §41 of the charter. A copy of the opinion is forwarded herewith. You are therefore advised that the Recreation and Park Commission cannot legally transfer title to Columbia Square to the Board of Education even though the board agrees to operate a school yard thereon for recreational purposes.

For the reasons heretofore stated, the answer to question 2 must be in the negative.

It necessarily follows that question 3 becomes moot because of the holding in reference to the above two questions.

The answer to question 4 is in the affirmative. Copy of my opinion dated March 27, 1950 is forwarded herewith for your guidance in the event that you wish to proceed under the Park Abandonment Act.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Recreation and Park Department

LFD

No. 144

March 27, 1950

SUBJECT: COLUMBIA SQUARE; USE THEREOF BY FIRE DEPARTMENT FOR DRILL TOWER

Dear Sir:

This office is in receipt of your request for an opinion as to whether Columbia Square may be transferred to the Fire Department for the use as a drill tower, in view of the fact that the present drill tower of the Fire Department must be abandoned because of the construction of the Bayshore Freeway.

O P I N I O N

Columbia Square, referred to in your request, is a portion of the pueblo lands reserved by the City and County of San Francisco, pursuant to the Van Ness Ordinance, for park purposes.

On June 6, 1949, I rendered an opinion to the Park Commission regarding the abandonment of Columbia Square, pursuant to Section 41.1 of the Charter. As pointed out in that opinion, the procedure for the abandonment of parks under Section 41.1 is that set forth in the General Laws of the State of California. The Park Discontinuance Law of 1927, referred to in the opinion of June 6, 1949, was codified at the recent session of the Legislature and is now located in the Government Code, §38440 to §38462. As pointed out, the abandonment of a park under that act would require the submission of the question of discontinuance and abandoment of the park to the electors and the approval thereof by a two-third's vote. (GOVERNMENT CODE, §38450 and §38451.) After the approval by the electors, the land would be held by the City in fee and might be disposed of by the City as it deemed proper. (GOVERNMENT CODE, §38460.) If the electors were to approve the abandonment of Columbia Square, the land thereof could thereafter be used by the City for any purpose.

You are therefore advised that should it be the desire to make Columbia Square available to the Fire Department for the purposes outlined above, this may be done by following the procedure set forth in Section 41.1 for the abandonment of Columbia Square as a park, after which the land can be transferred to the Fire Department.

Respectfully submitted,

DION R. HOLM,
City Attorney

To: Mayor Elmer L. Robinson.
cc: Chief Edward P. Walsh
Fire Department.
Park Commission.
Recreation Commission.

March 25, 1948

SUBJECT: Authority of Park Commissioners to Grant Permission to the California Centennials Commission to Erect Buildings on Portsmouth Square.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"The Commission has received an application from the California Centennials Commission for permission to construct a building on Portsmouth Square, located between Kearny and Washington Streets, to be used during the years 1948-1949, and 1950, as an office for the California Centennials Commission and an information center. In addition thereto it is proposed to construct a school house with an adjoining auditorium and a museum for exhibits.

"In view of Section 41, does the Commission have a legal right to allow the construction of buildings and the use of Portsmouth Square for the hereinabove stated purposes?"

OPINION

The pertinent portion of Section 41 of the Charter of the City and County of San Francisco, dealing with the authority of the Park Commission reads as follows:

"The commissioners shall have the complete and exclusive control, management, and direction of the parks, squares, avenues, grounds and recreation centers, now or hereafter placed under charge of the commission, including exclusive right to erect and to superintend the erection of buildings and structures thereon, except as in this charter otherwise provided.

"The commissioners shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park, square, avenue or ground, except for recreation purposes, * *."

It will be noted that by virtue of the provisions of Section 41 of the Charter, the Park Commission may not permit the building, maintenance or use of any structure in any park, except for recreation purposes.

It is apparent that recreation is the real reason for the existence of public parks. The question before us, therefore, is whether the structure proposed to be erected is for recreational purposes.

In CITY OF FORT WORTH v. BURNETT, 115 S. W. (2d) 436, the court held that land conveyed to the city "for the purpose of creating a park and place of recreation" forbade the erection by the city of a public library.

In 53 C. J. 659, recreation grounds are defined as grants of land near populous places for use for the recreation of adults, and as playgrounds for children.

Our courts have defined the word "park" as "a piece of ground set apart and maintained for public use and laid out in such a way as to afford pleasure to the eye, as well as opportunity for open air recreation." (COUNTY OF LOS ANGELES v. DODGE, 51 C.A. 492.)

In FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE the word "recreation" is defined as: "The act of recreating, or the state of being recreated; refreshment of body or mind after toil; diversion; amusement. Any diverting or pleasurable exercise or employment. Refreshment."

It is apparent from the foregoing that the word "recreation" implies that the structure must tend toward the enjoyment by the citizens of the particular park. The erection of an office for the California Centennials Commission does not come within this designation. This conclusion must also be reached with respect to the school house. It is possible, however, that the museum for exhibits might well come within the term "recreation" should the Park Commission find that the exhibits would be of a diverting or pleasurable nature. We have our deYoung Museum in Golden Gate Park and it is quite likely that the museum proposed by the California Centennials Commission would be proper for a public park.

You are therefore advised that, with the possible exception of the museum for exhibits, the Park Commission would have no authority, by virtue of Section 41 of the Charter, to grant the request of the California Centennials Commission.

Respectfully submitted,

Board of Park Commissioners CITY ATTORNEY

OPINION NO. 232
August 24, 1950

SUBJECT: JUVENILE HALL (YOUTH GUIDANCE CENTER) - EMERGENCY SHELTER FOR MINORS OVER 48 HOURS SANS FILING OF PETITION.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Public and private agencies have informally asked if the Youth Guidance Center will provide emergency shelter care for children. The duration of such care might extend for a week into a period of a month, for the following reasons:

"1. Inability to secure emergency foster home placement;

"2. Physical condition of the child not warranting acceptance in San Francisco Hospital, and not applicable for foster home placement;

"3. The need for the study of a small child in a group situation that might require several weeks.

"These children would be mainly dependent children who would eventually be placed in foster homes through the public and private agencies. We feel that this service is necessary, and if there is conflict with the above section of the Welfare and Institutions Code, how may we allocate space so that we can meet this community need in providing shelter without filing a petition on behalf of the child."

O P I N I O N

The "Youth Guidance Center" is a "Juvenile Hall," the name "Youth Guidance Center" having been designated for use by the Juvenile Department and Probation Committee on June 16, 1947.

Juvenile Hall is defined in section 660, Welfare and Institutions Code as follows:

"Section 660. Provision and maintenance: Designation: Reference to detention homes: Construction. The board of supervisors in every county shall

provide and maintain, at the expense of the county, in a location approved by the judge of the juvenile court, a suitable house or place for the detention of wards of the juvenile court and of persons alleged to come under the provisions of Section 700. Such house or place shall be known as the 'juvenile hall' of the county. Wherever in any provision of law reference is made to detention homes for juveniles, such reference shall be deemed and construed to refer to the juvenile halls provided for in this article."

Section 729.5 of the Welfare and Institutions Code provides:

"Section 729.5. Release of minor where petition not filed within forty-eight hours after minor taken into custody: Minor in custody twenty-four hours after filing of petition: Hearing: Release from custody. Whenever a minor under the age of eighteen years is taken into custody by any peace officer or probation officer, such minor shall be released within forty-eight hours after having been taken into custody, excluding Sundaysand non-judicial days, unless within said period of time a petition in accordance with subdivision (a) of Section 720 concerning him is filed with the clerk of the superior court or a criminal complaint against him is filed in a court of competent jurisdiction.

"If the minor remains in the custody of any peace officer or probation officer, within twenty-four hours, excluding Sundays and non-judicial days, after the filing of the petition, the judge of the juvenile court shall conduct a hearing for the purpose of determining the reasons for the necessity of the detention of the minor. If within said period such a hearing has not been held then the minor shall be released from custody."

Section 720 of the same code provides:

"Section 720. Manner of invoking court's jurisdiction. A person subject to its jurisdiction may be brought before the juvenile court by any of the following means:

"(a) A petition praying that such person be declared a ward of the juvenile court, and be dealt with according to the provisions of this chapter.

"(b) A petition that such person be declared

free from the custody and control of his parents.

"(c) Certification from any other court before which such person is brought, charged with the commission of a crime."

Section 729 provides:

"Section 729. Temporary custody and detention of minor: When authorized: Notice to parents or guardians: Filing petition: Segregation from minors charged with criminal offenses. Any probation officer or peace officer may take temporary custody of and detain in the juvenile hall, or in some other suitable place designated by the juvenile court, any person under the age of twenty-one years who comes within any of the following descriptions when such custody or detention is a matter of immediate and urgent necessity for the protection of the welfare of the child:

"(a) Who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control, and who is in need of such control.

"(b) Who is destitute, or who is not provided with the necessities of life by his parents, and who has no other means of obtaining such necessities.

"(c) Whose home is an unfit place for him, by reason of neglect, cruelty, or depravity of either of his parents, or of his guardian or other person in whose custody or care he is.

"(d) Who is found wandering and either has no home, no settled place of abode, no visible means of subsistence or no proper guardianship.

"(e) Who is a vagrant or who frequents the company of criminals, vagrants, or prostitutes, or persons so reputed; or who is in any house of prostitution or assignation.

"(f) Who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral life.

"(g) Who is insane, feeble-minded, or so far mentally deficient that his parents or guardians are unable to exercise proper parental control over him, or whose mind is so far deranged or impaired as to endanger the health, person, or property of himself or others.

"(h) Who is found in any street or road or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care and who has no parent or guardian who can be found able or willing to provide necessary care, shelter, treatment, hospitalization, or other remedial care of such person.

"Provided, that in all such cases the probation officer or peace officer shall give immediate notice to the parents or guardians of the person taken into custody or placed in detention under the provisions of this section and thereafter shall file a petition with the juvenile court relating to such person as provided for in Section 721 unless within forty-eight hours such person has been restored to the custody of a parent, guardian or other responsible relative.

"In all cases such minor shall, while being so detained, be segregated from minors charged with any criminal offense under Section 700 of the Welfare and Institutions Code, or section of any other code or provision of law."

The Juvenile Hall is to be used for the shelter and detention of wards of the juvenile court and persons alleged to come under the provisions of section 700 of the Welfare and Institutions Code. The cited sections use the language "take - custody by any peace officer or probation officer."

No minor can be detained at the Hall in excess of forty-eight hours unless a petition is filed pursuant to sections 729.5, 700, 701, 720 or 721, Welfare and Institutions Code.

The Hall is for the detention, temporary or otherwise, of minors taken into custody. It (the Hall) cannot be used to provide emergency shelter care for children unless the child has been taken into custody, and then for not more than forty-eight hours unless a petition is filed as set forth in the Code. Space in the Juvenile Hall cannot legally be allocated for the purposes set forth in your request. You are, therefore, advised accordingly.

Respectfully submitted

DION R. HOLM
City Attorney

To: George W. Ososke
Chief Probation Officer

CWH

OPINION 233-50
SEE OPINION 79-5

Opinion No. 233

August 24, 1950

SUBJECT: EMERGENCY APPOINTMENT AS JANITOR; 90 DAY LIMITATION IMPOSED BY §149 OF THE CHARTER - LOUIS MARQUARDSEN.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Mr. Louis Marquardsen was employed by this Department as a Janitor on an emergency appointment. This type of employment comes under the 90-day limitation imposed by Section 149 of the Charter.
>
> "Mr. Marquardsen had been employed in other departments of the City government before coming to this office, and it now develops that the total of his City service in the past fiscal year exceeded a 90-day period. As a result, the Civil Service Commission has refused to approve the payroll covering the last half of June.
>
> "Mr. Marquardsen has been informed by this Department that under the circumstances, there is no method by which he can be compensated. In order that the matter may be finally resolved, it is requested that a formal opinion be given as to the possibility of payment to Mr. Marquardsen."

O P I N I O N

Section 149 of the Charter expressly states:

> ". . . No person shall be compensated under any non-civil service emergency appointment or appointments as authorized under the provisions of this paragraph for a period exceeding ninety days in any fiscal year, and no claim or warrant therefor shall be approved, allowed or paid for any compensation in excess of such ninety days."

Such employee accepts employment subject to the Charter provisions and said employee assumes the department head is bound thereby. Therefore, any employee who works in excess of ninety days cannot be compensated. (See Dunn v. Civil Service Commission, 3 CA (2) 554).

Respectfully submitted,

DION R. HOLM
City Attorney

To: Mr. Sherman P. Duckel, Director
Department of Public Works

cc: Mayor's office

JFM

OPINION NO. 234
August 24, 1950

SUBJECT: LAUNDERETTES AS LAUNDRIES; LAUNDERETTES IN COMMERCIAL ZONES.

Dear Sir:

This office is in receipt of a request for an opinion which reads as follows:

REQUEST

"Sometime ago you wrote an opinion to the effect that launderettes as then operated were not laundries subject to regulation under the Municipal Code and to operation in light industrial districts only as required by the zoning ordinance.

"This office has now a report on an investigation of a cross section of the launderettes within the city and it appears from this report that the operation of those established has changed considerably since your opinion was prepared.

"Will you please advise as to whether your prior opinion applies to launderettes as described in the following report:

"'A patron calls at the launderette with clothes or other articles to be cleansed and, as a rule, she places these articles in the washing machine herself. There are a few exceptions where the operator of the establishment puts the clothes in the machine. The customer is given a ticket by the operator and told to return later. The operator adds soap to the machine, removes the clothes when washed and puts them into a dryer. When the clothes are washed and dried they are wrapped by the operator, ready for the customer to pick up.

"'One launderette investigated, not only washes the clothes but does finished laundry. Dry cleaning is also done at this establishment. It advertises: "FINISHED LAUNDRY - 8-HOUR SERVICE".

"'All the launderettes are located in Commercial Zones although the Zoning Law prohibits the operation of a Wash Laundry in a Commercial Zone.'

"My questions are:

"1- May launderettes, as defined above, operate in Commercial Zones?

"2- May launderettes, as defined above, operate without paying license fees as provided by the Municipal Code for laundries?"

O P I N I O N

Section 354 of Article 7 of the Health Code, which will also be found in Part II, Chapter V of the San Francisco Municipal Code, reads in part as follows:

> "SEC. 354. Establishment and Maintenance of Public Laundries. It shall be unlawful for any person, firm, corporation or association of persons to establish, maintain, operate or carry on the business of a public laundry or washhouse, where clothes or other articles are cleansed, ironed, washed, starched, marked or sorted for hire or profit, in any building or premises within the limits of the City and County of San Francisco, without having first obtained a permit therefor from the Department of Public Health, which said permit shall specify the name of the permittee and the location of the premises used or to be used as such laundry or washhouse." (Italics ours)

It is apparent from a reading of your request that some launderettes are not only renting the machines in which the washing is done, but are also rendering laundry service in the nature of removing the clothing from the machine, drying the clothing, and wrapping the clothing, and that at least one launderette does finished laundry.

Under the circumstances enumerated above, it is apparent that some of these launderettes come within the designation of a laundry as defined by section 354 of the Health Code.

In an opinion rendered on October 26, 1945, my predecessor

advised that a coin-in-slot laundry did not come within the designation of a laundry, as the attendant did not handle any of the laundry, but merely rented the machine for hire or profit, and it was therein held that no license fees could be charged, and that no permit was required.

Likewise, on May 13, 1947, my predecessor advised that the fact that an hourly charge was made depending upon the length of time the machine was used would not change the character of the launderette. Whether the launderette was a "coin-in-slot launderette" or one in which an hourly charge was made, the conclusion was the same. However, we are here met with a different situation under the facts disclosed by your request.

In connection with the zoning phase of this matter, Section 5 of Article 1 of the City Planning Code, which can also be found in Part II, Chapter II of the San Francisco Municipal Code, reads in part as follows:

> "SEC. 5. Commercial District. In a Commercial District no building or premises shall be used and no building shall be constructed or altered, which is arranged, intended or designed to be used for any of the following specified trades, industries and uses:
> *
> (j) Laundry;."

Given the foregoing premises, the answers to your queries are as follows:

1. May launderettes, as defined above, operate without paying license fees as provided by the Municipal Code for laundries?

Section 120, Part III of the Municipal Code provides that the keepers or owners of laundries, or those representing themselves as such, shall pay certain designated license fees depending upon the number of persons employed. In view of my conclusion that the circumstances disclosed by your request indicate that certain launderettes are conducting laundries, you are advised that license fees should be collected from this particular type. This does not apply to the launderette which merely rents its equipment.

You are likewise advised that, should the questionable launderettes revert back to the original practice of only renting their machines, and the operators of such establishments or their employees shall refrain from cleaning, drying or ironing clothes, the two opinions of my predecessor, hereinbefore mentioned, would govern.

2. May launderettes, as defined above, operate in Commercial Zones?

You are advised that the specific type of launderette operating under circumstances mentioned in your communication must be considered as a laundry and may not operate in a commercial district. The launderette which merely rents equipment may operate in a commercial district.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Mr. Thomas A. Brooks
Chief Administrative officer.

RJB

OPINION NO. 235

August 24, 1950

SUBJECT: REFUND OF PURCHASE PRICE TO PURCHASER OF TAX-DEEDED PROPERTY UNDER SECTION 3731 OF THE REVENUE AND TAXATION CODE

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "The Tax Collector recently sold an area, 20 feet by 100 feet, listed by the Assessor as Lot 18F, Block 1866. The purchaser, John Hofer, Jr., purchased the tax deeded property for $1025. without seeing it.
>
> "In conducting the sale, the Tax Collector announced that according to Section 3712 of the California Revenue Code (1949), sale deeds would convey title subject to any lien for installments for special assessments and to any easements and restrictions of record. Any potential buyer was therefore warned to investigate the property before bidding on it. Mr. Hofer did not protect himself accordingly.
>
> "Shortly after paying for the property he purchased, Mr. Hofer returned to the Tax Collector's office while the sale of other property was in process and asked for his money back. His reason for doing so was that he had learned that the parcel purchased is an easement to the adjoining lots and is used as a part of an unobstructed passageway twenty feet in width. Technically, the Tax Collector was correct in selling Lot 18F, Block 1866 at public auction to Mr. Hofer. However, the property has no value to him because the people who live in the block have a right to unrestricted use of the strip he bought. No building can be put up on it.
>
> "Technically and legally the sale was not improper, but practically, it perhaps should not have been sold. While it is evident that the sale was legal and the buyer should have investigated the parcel before buying, this appears to be a case of a sale to an unwary purchaser of a worthless lot.

"May I have a legal opinion on the point raised, that is, refund of the purchase price."

O P I N I O N

Section 3731 of the Revenue and Taxation Code reading as follows:

> "§ 3731. Refund upon showing that property should not have been sold: Manner of making refund. The purchaser of tax-sold or tax-deeded property upon execution of a quitclaim deed, is entitled to a refund of the amount paid as purchase price whenever it is determined by the board of supervisors, and upon the written approval of the district attorney, that the property should not have been sold for taxes. The refund shall be made in the same manner as a refund of an overpayment of tax."

was adopted at the 1949 session of the State Legislature and as yet there have been no court opinions interpreting the section.

I am of the opinion that Section 3731 of the Revenue and Taxation Code does not apply in the factual situation set forth in your letter. The purchaser of the tax-deeded property has succeeded to all the rights of the prior owner. He cannot now, because of the failure to investigate and determine exactly what those rights were, secure a refund of the purchase price on the basis of § 3731. While as a practical matter, the Tax Collector should possibly not have put the property in question up for sale, there was no legal restriction on his doing so and the duty was on the purchaser to ascertain exactly what rights he was acquiring by the purchase of the property.

I realize that this is an unfortunate situation for the purchaser but in the absence of legislative authorization for a refund of the purchase price, no refund may be made to him. I am of the opinion that § 3731 does not authorize a refund in this case.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM

TO: Chief Administrative Officer
City Hall

No. 236

August 25, 1950

SUBJECT: RIGHT TO MAKE TEMPORARY NON-CIVIL SERVICE APPOINTMENTS PURSUANT TO SECTION 149 OF THE CHARTER: CASE OF JOSEPH LICHT.

Dear Sir:

This office is in receipt of your request for an opinion reading as follows:

"An urgent situation has developed as a result of Judge Weinberger's decision in the Galli vs. Henderson case, and we request your immediate advice in respect thereto.

"The essence of the issue in that litigation is the authority of the Civil Service Commission to authorize under section 149 of the charter, and the right of an appointing officer to make a non-civil service appointment to a position where immediate service is necessary to serve until the civil service eligible is appointed and has reported for duty when a list of eligibles "exists".

"Although there may be a list of eligibles in "existence" for appointment to a particular position, time is required to process and complete the appointment and to fill the position from the list of eligibles. After the approval of the requisition by the Mayor and after certification of funds for the compensation of the employment by the Controller, the position is offered to the person whose name stands highest on the list of eligibles for such appointment. That eligible has three days to notify the Civil Service Commission of his acceptance or refusal of the appointment. If he accepts and the position is to be filled under permanent appointment, the eligible is sent to our physician for a medical examination. If he passes the medical examination he is allowed, as a matter of course, ten days to report for duty in order that he may give reasonable notice to his present employer, or if proper reasons therefor are given, the Commission may, upon request of the eligible and approval of the appointing officer, extend this time in which to report. If, on the other hand, the eligible standing highest on the list refuses the proferred appointment, the position is then offered to the eligible standing next highest in line for appointment, and so on down through the list of eligibles until an eligible accepts the appointment or until all eligibles thereon have refused the appointment. If an

eligible is rejected for appointment by our medical examiners, we may in borderline cases, authorize a further medical examination. In order to protect the rights of the eligible involved, the position is not offered to persons below him until his medical status is clarified and he is either appointed or rejected.

"The procedures involved in the certification and appointment of a civil service eligible and the assumption of the duties by the eligible who is entitled to the position under the civil service laws, are established under the authority of section 140 of the charter and are designed to protect civil service rights of eligibles and facilitate the orderly filling of positions. In many instances the appointing officer needs immediate service in the position. The absence of service in the position occasioned by the inability of the appointing officer to obtain immediate service, may on occasion (1) interfere with the orderly and efficient operation and functioning of the department; or (2) may disrupt, impair or impede the normal operations of the department; or (3) may cause loss or damage to the city and county; or (4) may even endanger life and property of the citizens of San Francisco.

Section 149 of the Charter provides as follows:

> "When no list of eligibles is available for a position in the class requisitioned by the appointing officer, the Commission may certify for civil service temporary appointment an eligible from another list deemed by the Commission to be suitable to temporarily provide the service desired; or may authorize the appointing officer to make a non-civil service emergency appointment thereto for a period not exceeding ninety days and only until a regular appointment under the provisions of this charter can be made.***"

"We have continuously since 1932, when that provision became effective, and prior thereto under the former charter, interpreted this provision to mean that a civil service list of eligibles for the filling of a position is not "available" unless under the rules of the Civil Service Commission adopted pursuant to the provisions of Section 140 of the charter, a civil service eligible is available for immediate appointment and service in the position.

"It would appear from Judge Weinberger's decision that

this interpretation is completely in error and that the "mere existence" of a list would prohibit the Civil Service Commission from authorizing and the appointing officer from employing any non-civil service person to serve pending the certification of a civil service eligible, even though as a consequence the various departments would be denied the necessary service until such time as the civil service eligible reports for duty.

"Although Judge Weinberger, in discussing the effect and implications of his decision with us last week, first stated that his decision dealt only with the facts of the particular case before him, and that his decision did not mean that it would necessarily be improper to authorize non-civil service appointments in other circumstances, even though a list of eligibles "existed", he later stated that he interpreted the word "available" as used in section 149 to mean in fact "existence" and therefore the mere "existence" of a list of eligibles precluded a non-civil service appointment under any circumstances. We do not need to point out to you the dire consequences to the municipal service if such a decision is allowed to stand. The decision will of course be appealed but in the meantime we normally and continuously have several hundred such situations in existence and the responsibility of approving such authorizations and approval of the payrolls involves very substantial sums.

"We therefore request you to advise us as follows:

1. In view of the Municipal Court's decision in this case and pending final determination of the issues, am I justified in continuing to authorize appointing officers to make non-civil service appointments, pending certification of a civil service eligible, in case of necessity for immediate service when a list of eligibles exists; and are appointing officers justified in making such appointments under these circumstances.

2. Several hundred such authorizations pending certification of civil service eligibles are now in effect. Am I justified in permitting these non-civil service appointments to continue until civil service eligibles may be appointed.

3. As Secretary of the Civil Service Commission and the official charged with the responsibility for approving the legality of appointments and payrolls, am I justified in approving payrolls for the period ending Aug-

ust 15 for such non-civil service appointments for services rendered under authorizations heretofore approved."

O P I N I O N

Since receiving your request for an opinion in connection with this matter Judge Alvin Weinberger of the Municipal Court handed down a written opinion, which reads as follows:

"This is a suit by a tax-payer against the Secretary of the Civil Service Commission and the Controller and Treasurer of the City and County of San Francisco to recover one hundred sixty one dollars and fifty cents ($161.50) paid to one Joseph Licht in alleged violation of the Civil Service provisions of the Charter of the City and County of San Francisco. The evidence disclosed that Mr. Licht for some time prior to July 1st, 1949, had served in the office of the Civil Service Commission as a "B210" Office Assistant. As of June 30th, 1949, Mr. Licht was subject to mandatory retirement because of age. Since his contributions to the Retirement System would have produced a pension of only nineteen dollars ($19.00) per month, he elected to withdraw his contributions and resigned his position prior to June 30th. Accordingly, on July 1st, 1949, Mr. Licht had no civil service status.

"Some time prior to July 1st, a requisition for the appointment of a B210 Office Assistant in the office of the Civil Service Commission was prepared under the Secretary's direction and a copy retained in the files of that office. For some unaccountable reason, the original of this requisition never reached the office of the Mayor or the Controller, and the Mayor's approval was not obtained prior to Mr. Licht's appointment, nor at any time during the month of July, 1949. In fact, at the time of trial the original requisition had not been located.

"Despite this non-compliance with Section 1.1 of the Annual Salary Ordinance, Mr. Licht served for the period from July 1st to 29th, and was paid one hundred and sixty-one dollars and fifty cents ($161.50) salary, the sum sought to be recovered in this action.

"The decision in this case depends upon the interpretation of Section 149 of the Charter relating to emergency appointments. The first part of the first sentence of this section deals with the power of the Civil Service Com-

mission to make temporary appointments from other lists when no list of eligibles is available for a position in the class requisitioned by the appointing officer. Here the evidence disclosed that there were four lists of B210 Office Assistant eligibles available, hence the first part of the section is not applicable.

"The second part of the first sentence of Section 149 permits the Commission to authorize non-civil service emergency appointments for a period not exceeding ninety (90) days, and only until a regular appointment under the provisions of the Charter can be made.

"It is interesting to note that Section 149 of the Charter authorizes the commission to certify for temporary appointment an eligible from another civil service list, but as regards the power to authorize a non-civil service appointment the word emergency is used. The Court cannot assume that this difference in language is inadvertent. If any meaning is to be given to the word "emergency" there must be at least a minimum showing of some urgency to justify a non-civil service emergency appointment. The court is of the opinion that the word emergency is broad enough to include cases where there are available lists, but no then available persons to fill a particular requisition, provided there is some urgency which requires a departure from customary procedure.

"The evidence in this case not only failed to show that there was any emergency justifying Mr. Licht's appointment, but on the contrary, it showed affirmatively that his appointment on a full time basis was unnecessary. The Secretary of the Civil Service Commission testified that although the Salary Ordinance provided for two B210 Office Assistants in the office of the Civil Service Commission the department could operate efficiently with one full time assistant and one part time assistant. The matter of reclassifying Mr. Licht's former position from full time to part time was under consideration by the Finance Committee of the Board of Supervisors at the very time that he was serving as an emergency appointee on a full time basis. On this testimony the Court has no alternative but to find that there was, in fact, no emergency which justified Mr. Licht's appointment.

"However, if it were possible for the Court to find in this case that an emergency existed, the decision would have to be the same for the reason that there was a total failure to comply with the provisions of Section 1.1 of

the Annual Salary Ordinance. This section prohibits appointing officers from making any appointment to a vacancy in a permanent position until the Mayor shall approve the requisition for such service; provided that in order to prevent the stoppage of essential services, the Civil Service Commission may provide for an emergency appointment pending such approval. The rules of the Civil Service Commission provide for an emergency appointment not to exceed three days without the Mayor's approval of a requisition. As has already been pointed out, the requisition for Mr. Licht's appointment was not approved within three days, nor was it approved while he was serving as an emergency appointee.

"It appearing to the Court that the Controller and Treasurer have complied with the provisions of Section 150 of the Charter of the City and County of San Francisco, judgment is ordered entered in their favor. As regards the Secretary of the Civil Service Commission, for the reasons above stated, the Court finds that his appointment of Mr. Licht was not in conformity with the Charter provisions and applicable ordinances and judgment is accordingly ordered against him and in favor of the plaintiff for and on behalf of the City and County of San Francisco for one hundred sixty-one dollars and fifty cents ($161.50) plus attorney fees in the amount of five hundred dollars ($500.00) and costs."

An examination of the written opinion discloses that it was intended to cover one specific case and not to establish a general rule of law.

Therefore there does not appear to be any sound reason why you should alter your established procedure.

1. The opinion of the Municipal Court in the Licht case is directed only to the peculiar facts and circumstances involved in the case itself, and that actually Section 149 of the charter has not been generally interpreted. Had the trial court proceeded upon a general interpretation of Section 149 in a case without the various factors and aspects involved in the Licht case, my views herein expressed would undoubtedly be different. In connection

with question one the Court in its opinion as a matter of dictum, said:

> "The court is of the opinion that the word emergency is broad enough to include cases where there are available lists, but no then available persons to fill a particular requisition, provided there is some urgency which requires a departure from customary procedure."

In view of the foregoing, it is my opinion that you are justified in continuing to authorize appointing officers to make non-civil service appointments, pending certification of a civil service eligible in case of necessity for immediate service, when a list of eligibles exists and there is a matter of urgency.

2. That you are justified in permitting these non-civil service appointments to continue until civil service eligibles may be appointed, if you are convinced that the appointments were the result of matters of urgency.

3. That as secretary of the Civil Service Commission you are justified in approving legality of appointments and payrolls for the period ending August 15th for such non-civil service appointments for service rendered under authorization heretofore approved, provided that such appointments can be classified as matters of urgency. In this regard, I suggest that you immediately get in touch with the heads of the various departments in order to determine whether the appointments were urgently required.

In connection with both answers 2 and 3, it is my opinion that the head of each department should indicate to you, in writing, at once, whether the appointments were made on an urgency basis.

Respectfully submitted,

DION R. HOLM
City Attorney

WAD

To: Mr. William L. Henderson
Personnel Director and Secretary
Civil Service Commission
151 City Hall
San Francisco 2

No. 237

August 25, 1950

SUBJECT: FOOD PURVEYING BY NEW SYSTEM; AIRLINE TYPE KITCHEN; MEALS DELIVERED BY TRUCK.

Dear Sir:

This office is in receipt of your request for an opinion which reads as follows:

> "The appended communication is forwarded for your consideration. As this is an entirely new method of food purveying we would appreciate your legal advice as to what license from this department would issue in such a case.
>
> "Your attention is directed to the fact that it is indicated that the premises for the cooking of all the meals will be outside of San Francisco. Obviously we would have no control over the kitchen in which the food is prepared."

The communication appended to your request for opinion reads as follows:

> "My client, Mr. Robert C. Fox, Jr., 1430 Arcadia Place, Palo Alto, California, is desirous of entering the catering business in San Francisco.
>
> "Mr. Fox proposes to establish an airline type kitchen comparable to the kitchens which produce food for passenger consumption on the various airlines. This will be a completely equipped kitchen and operated in accordance with the most modern and sanitary practices. Appropriate advertising will give the daily menu from which individuals in their homes or offices may order a meal by telephone. The telephone operator will, by radio, in turn repeat the order and its address to a walk-in type truck located in the area of the individual placing the order. The truck will then proceed to the address where its driver will assemble the food from the back of the truck in the following manner:
>
> "A. The cold food will be in paper containers on a compartmentalized, disposable paper tray. Paper lids will be used on the cold food where necessary. The paper trays will rest on slides within a metal box containing a metal door and refrigerated by dry ice.
>
> "B. The main dish, namely: a vegetable, potato, and

meat, will be contained in a paper casserole which rests in a thermos jug or heated box. The driver will remove the hot main dish and place it in its position on the paper tray. Soup will likewise be contained in a paper container having a lid and resting inside of a thermos jug or a heated box; it will be placed in its appropriate position on the tray.

"C. Hot coffee, hot tea, or cold milk will be served. The cold milk will be delivered in the usual paper cartons furnished by the dairies. Tea and coffee will be contained in thermos jugs having petcocks at their bottoms. The driver will take a paper cup containing a lid, fill the cup with coffee or tea, put on the lid, and place the coffee or tea in its proper compartment on the paper tray.

"Salt, pepper, sugar, cream, and salad dressing packaged in paper containers will be on the tray. Trays, plates, cups, wooden knives, wooden forks, etc., will all be of a disposable type.

"D. After the driver has placed the main dish, soup, and drink on the tray, he will then clamp a plastic lid with snap fasteners at its edge over the entire paper tray to protect it while effecting delivery from the truck to the buyer.

"E. The driver will leave the truck with the meal or meals, lock the cab door, ring at the buyer's door, and upon admission place the food on the nearest level surface. He will accept the money, make change, remove the plastic lid, return with it to the truck, open the door of the truck, and report to the base radio station that he has returned to the air.

"Following exactly the same system long in operation by the airlines, and under the supervision of the U. S. Dept. of Health, it becomes possible to deliver food several hours after cooking, at safe temperatures. This is accomplished by electrically heated compartments, the use of dry ice, or the use of thermos jugs. The food can be retained at safe temperatures by either of these methods up to seven hours from the time it leaves the kitchen.

"Mr. Fox's management consultant, Mr. R. P. Getz, has had conversations on the above subject with Mr. A. B. Crowley, your Chief Food and Sanitary Inspector, and Mr. Dion Holm, City Attorney. Mr.Fox desires to work in the closest possible cooperation with Mr. Crowley's department in the establishment and maintenance of hygienic trucks, personnel, kitchen, and equipment.

"Trucks, which have sold their entire supply of meals may be supplied with additional meals from the kitchen by other trucks.

"An opinion is requested as to whether any provisions exist within the ordinances of the City of San Francisco to preclude the licensing of Mr. Fox's company. Further information is also requested as to what licenses will be required--caterer's, restaurant, or peddler's.

"It is possible that Mr. Fox may establish the kitchen in either San Mateo or Santa Clara Counties. Were this to be done, the day's supply of food would be hauled by large trucks to San Francisco and there placed in the smaller trucks to serve the consumers. In the event this were to occur, what licenses would be required by the City of San Francisco?

O P I N I O N

There would appear to be nothing in the ordinances of the City and County of San Francisco that would preclude the licensing of the above type operators.

It would appear, since the food is sold by direct request of the buyer by telephone and then delivered and served at the buyer's premises, that the type of operation is catering rather than peddling or restaurant.

The requirements to operate the above type business are adequately covered by Section 440 of the Health Code of the San Francisco Municipal Code.

Respectfully submitted,

DION R. HOLM,
City Attorney

To: Dr. J. C. Geiger,
Director of Public Health

Through: Mr. Thomas A. Brooks,
Chief Administrative Officer

JFM

No. 238

August 29, 1950

SUBJECT: Superintendent of Street Repair; Superintendent of Street Cleaning; Whether Reclassification of Positions Resulted From Amending Titles and Duties of Supervisor of Street Repair and Supervisor of Street Cleaning

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Enclosed herewith is a copy of a report dated June 20, 1950 submitted by the writer to the Civil Service Commission at a recent meeting, which relates to two positions in the Department of Public Works.

"Recently the occupants of these two positions have filed with the Commission a request that they be granted salary adjustments effective immediately, which request they state is justified on the grounds that they are now performing more responsible duties than was formerly the case.

"In order to supplement the information contained in the attached report, we advise you as follows:

"The present occupant of the position presently titled F210 Superintendent of Street Repair was appointed to his position on September 10, 1943. This appointment resulted from an examination for the position then titled 0298 Supervisor of Street Repair. The position remained under this titling from date of the examination until December 29, 1948 when the Civil Service Commission retitled the position (the retitling to be effective July 1, 1949) to F210 Supervisor of Street Repair. The only change involved herein was in transferring this classification in the schematic arrangement of classes from the Miscellaneous Trades Division of our classification to the Engineering Division of the classification. A further change was made in the titling of this position on February 1, 1950 when the Civil Service Commission made an order changing the title from F 210 Supervisor of Street Repair to F 210 Superintendent of Street Repair, effective July 1, 1950. The reasons for this latter change are fully explained in the attached report.

"The occupant of the position designated J 112 Superintendent of Street Cleaning was appointed to the position on April 10, 1934. The list of eligibles from which the present occupant was appointed was adopted on July 28, 1931, and the position was then classified and titled J112 Superintendent, Bureau of Street Cleaning. Prior to the date of the appointment of the present occupant, the position and the then existing list of eligible had been retitled J 112 Supervisor of Street Cleaning. This change in title occurred on February 21, 1934 at which time the position of General Superintendent of Streets was established with supervision over both street cleaning and street repairing. The position remained under the title of J112 Supervisor of Street Cleaning until February 1, 1950 when the Civil Service Commission retitled the position, effective July 1, 1950 to be J112 Superintendent of Street Cleaning when it was determined to abolish the position of General Superintendent of Streets. The circumstances surrounding this change are set forth in the accompanying report.

"With this information together with that contained in the attached report, the commission desires your advice on the following questions:

1. Does the action of the Commission on February 1, 1950 in retitling these positions from Supervisor to Superintendent constitute an actual reclassification of the positions?

2. If your answer to the above is in the affirmative, does the Civil Service Commission have the power, under section 141 of the charter, to grant the present occupants of the positions the right to continue to perform the duties of the positions without examination?

3. If your answers to the preceding questions are in the affirmative, can the Civil Service Commission now recommend and make effective during the current fiscal year salary increases for the occupants of these positions?

"For your further information we enclose a copy of a statement of policy of the Civil Service Commission which formalizes and sets up written advice for its guidance in dealing with such matters. Although this statement was adopted by the Commission on June 29, 1949, it merely confirms and continues the policies which had guided the Commission over the years."

The added sources of information referred to in your request, i.e., the report of June 20, 1950, and the Commission resolution, have been considered in formulating the opinion which follows:

O P I N I O N

Section 141 of the Charter, in declaring the powers and duties of the civil service commission, provides in part as follows:

> ". . . The commission shall classify, and from time to time may reclassify, in accordance with duties and responsibilities of the employment, and training and experience required, all places of employment in the departments and offices of the city and county not specifically exempted by this charter from the civil service provisions thereof. . . . . The civil service commission shall be the judge of such classification."

In other portions of the same charter section, the commission is expressly empowered to make rules which "shall govern", among other things, the matter of "classification."

The foregoing excerpts from section 141 illustrate that the commission has been vested with a plenary power over the subject of civil service classification.

In a treatment of the general subject in 62 C. J. S. 1443 ("Municipal Corporations"), the following is said:

> "In discharging its duties with respect to classification the commission has a broad discretion within the limits of the statute conferring rule-making power in this respect . . . . . the classification made by the commission . . . will not be disturbed or set aside by a court where it is not palpably illegal, capricious, or arbitrary . . ." (Citing PRATT v. ROSENTHAL, 181 Cal. 158 and LEFTRIDGE v. CITY OF SACRAMENTO, 59 Cal. App. (2) 516)

In the LEFTRIDGE case, at page 524, the court pointedly observes, on the issue of the validity of a civil service board's determination of a position classification, that,

> ". . . A determined classification is presumed to be reasonable and valid, and will be upheld unless it appears to be palpably arbitrary."

A perusal of the information contained in and supplied with the request for opinion indicates that it was the determination of the commission that when the positions F210 Supervisor of Street Repair and J112 Supervisor of Street Cleaning were redesignated F210 Superintendent of Street Repair and J112 Superintendent of Street Cleaning, no reclassification of either position was effected. Of course, a mere retitling would not have the effect of reclassifying the respective positions. It is to be noted, however, that not only was each "Supervisor" position subjected to an amendment of title (i.e., to "Superintendent"), but the duty statement in each of the "Superintendent" positions enumerates duties which were not enumerated in the respective duty statements of the "Supervisor" positions.

A scanning of the "Superintendent" duty statements shows that each of the employees involved, i.e., MESSRS. MERRILL and BONSOR, have been given duties formerly allocated to the abolished classification, F220 General Superintendent of Streets. For purposes of identifying the differences, the several duty statements are herein set forth in full, as follows:

> F220 GENERAL SUPERINTENDENT OF STREETS - Subject to administrative approval: has charge of and is responsible for the proper administration of the bureau of streets; directs all activities in connection with the cleaning, repair, and reconstruction of streets; directs and schedules the hauling and disposal of street cleanings; cooperates with the bureau of engineering in the development of street reconstruction programs; directs and supervises such reconstruction operations; approves requisitions for supplies and materials; and performs related duties as required.
>
> F210 SUPERVISOR OF STREET REPAIR - Under general administrative direction: has charge of the repair, reconstruction and maintenance of streets; plans and directs the work of all employees engaged in such work; supervises the requisitioning of supplies; maintains necessary records; makes required reports; and performs related duties as required.
>
> F210 SUPERINTENDENT OF STREET REPAIR - Under general administrative direction: has charge of the repair, reconstruction, and maintenance of streets; plans and directs the work of all employees engaged in such work; <u>cooperates with the bureau of engineering in the development of street reconstruction programs</u>; <u>directs and supervises such reconstruction operations;</u> supervises the requisitioning of supplies <u>and materials;</u> maintains necessary records; makes required reports; and performs related duties as required.

J112 SUPERVISOR OF STREET CLEANING - Under general direction: assists in the planning and directing of the cleaning of all streets, the hauling and disposal of street cleanings; the securing of dumping grounds therefor; the assignment of all employees and equipment; in the handling of complaints and the maintenance of office operating maps and schedules as well as all activities of the street cleaning division of the department of public works; also makes required reports; and performs related duties as required.

J112 SUPERINTENDENT OF STREET CLEANING - Under general administrative direction: has charge of the planning and directing of the cleaning of all streets, the hauling and disposal of street cleanings, the securing of dumping grounds therefor, the assignment of all employees and equipment, the handling of complaints and the maintenance of office operating maps and schedules as well as all activities of the street cleaning division of the department of public works; supervises the requisitioning of supplies and materials; also makes required reports; and performs related duties as required.

(The underscored portions of the duty statement of each "Superintendent" position illustrate, by comparison with each "Supervisor" duty statement, the amendments. Comparison with the duty statement of the abolished "General Superintendent" shows that certain of the duties of that position have been engrafted upon the "Superintendent" positions.)

In view of the applicable law before noted, it was within the province of the civil service commission to determine whether the duty amendments noted above had the force of reclassifying the positions occupied by Messrs. MERRILL and BONSOR. The action of the commission in giving those former "Supervisors" status in the "Superintendent" positions constitutes, by necessary implication, a determination by the commission that no reclassification was effected by the amending action now under consideration. Such determination cannot be interfered with unless it was palpably arbitrary and capricious. (62 C. J. S. 1443; PRATT v. ROSENTHAL, supra; LEFTRIDGE v. CITY OF SACRAMENTO, supra.) I find myself unable to conclude that the commission action can be so designated. Such conclusion, if capable of being drawn, would now have to be that of a court.

In light of the foregoing, and in view of the charter grant of full power to the civil service commission over all matters of classification, you are advised that the commission's implied determination of non-reclassification is prima facie controlling. In view of the conclusion just drawn relative to the first query in your request for opinion, it becomes unnecessary to answer your second and third questions.

Respectfully submitted,

DION R. HOLM
City Attorney

WFB

To: Mr. William L. Henderson
Personnel Director & Secretary
Civil Service Commission

No. 239

September 7, 1950

SUBJECT: PUBLICATION OF NOTICES, ETC., REQUIRED BY THE CHARTER IN A SINGLE EDITION OF THE OFFICIAL NEWSPAPER IS COMPLIANCE WITH REQUIREMENT OF THE CHARTER COVERING PUBLICATION; SECOND OPINION

Dear Sir:

This office is in receipt of your request for an opinion which reads as follows:

> "This refers to the Opinion which you rendered to me, as President of the Commission, in response to my inquiry and request for an Opinion on the subject matter referred to therein.
>
> "It is noted, after the citation of the authorities relied upon by you for the expression of your Opinion, that you conclude your advice to the Commission to the effect that the publication required by the Charter made in a single edition of the official newspaper of the City and County of San Francisco, which contains substantially the same news as other editions and is distributed generally among the subscribers, complies with the Charter requirement of publication.
>
> "While your Opinion as quoted appears to clearly state the requirement, however there is still confusion in the minds of members of the Commission as to the regularity of the publications made in the official newspaper for the reason that some of the early editions of the issues published on a given date, and which may contain the notice required to be published under the Charter, may not be an edition which is distributed generally among the subscribers but one generally placed on sale upon the streets or in other localities. It is, therefore, thought that your Opinion indicates if the publication appears in the official newspaper in an edition which is not distributed generally among the subscribers, it does not comply with the requirements of the Charter.
>
> "If this interpretation of your Opinion is correct, we shall be pleased to have you formally advise us to that effect so that we may be guided accordingly in observing the requirements of the Charter in the publication of notices of zoning and reclassification required to be published prior to hearings by the Commission."

O P I N I O N

In Opinion No. 209, you were advised "that a publication required by the Charter made in a single edition of the official newspaper of the City and County of San Francisco which contains substantially the same news as other editions and is distributed generally among the subscribers of the newspaper complies with the Charter requirement of publication".

Section 13 of the Charter provides in part as follows:

"The term 'published' as used in this charter shall mean publication in the official newspaper asrequired by charter. The official newspaper is hereby defined to be a daily newspaper of general circulation, published in the city and county and which has a bona fide daily circulation of at least 8,000 copies."

My investigation reveals that the San Francisco Chronicle is the newspaper which has been designated by the Board of Supervisors as the official newspaper of the City and County of San Francisco for the current fiscal year, pursuant to the provisions of Section 13 of the Charter, quoted above, and that said newspaper publishes a special edition designated as the CP Edition (City Printing Edition), in which edition the official notices of the City and County of San Francisco are printed. The CP Edition always publishes more than the 8,000 copies required by Section 13 of the Charter. The CP Edition has a special subscription list of its own of persons who have made a special request to have that particular edition delivered to them. Those copies not so delivered to the special subscription list are either delivered to other subscribers of the paper at their homes or are distributed generally on news stands throughout the City and County of San Francisco.

I am of the opinion that under the facts set forth above, the publication of the official notices required by the Charter in the CP Edition of the daily newspaper designated as the official newspaper of the City and County of San Francisco by the Board of Supervisors, meets the Charter requirement of publication of notices.

Respectfully submitted,

LSM

DION R. HOLM
City Attorney

To: Mr. Ernest J. Torregano, President
City Planning Commission

cc Mr. Paul Opperman, Director City Planning Commission
Mr. Thomas A. Brooks, Chief Administrative Officer

No. 240

September 7, 1950

SUBJECT: JUVENILE PROBATION COMMITTEE IS ADVISORY TO PROBATION OFFICER IN MANAGEMENT OF JUVENILE HALL; MEMBERS MUST GIVE BOND AS REQUIRED BY BOARD OF SUPERVISORS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "I have been asked to make inquiry of you by members of our Probation Committee as to the effect of the amendment made to Section 662 of the Welfare and Institutions Code. By reason of that amendment the Probation Committee has become an advisory body insofar as the Juvenile Hall is concerned, and it is no longer directly under their management and control as previously provided.
>
> "The committee would like to know, first, whether in view of this amendment it is necessary for the chairman to sign warrants or resolutions in reference to appropriations or any of the other papers that are now being signed concerning the operation of the Juvenile Hall; and second, whether it is necessary for the members of the committee to be under bond.
>
> "We will appreciate your opinion as to these matters."

OPINION

Section 662 of the Welfare and Institutions Code, as amended, reads as follows:

> "§662. MANAGEMENT AND CONTROL OF HALL; PROBATION COMMITTEE TO ACT IN ADVISORY CAPACITY. In all counties having a population in excess of two million the internal affairs of the juvenile hall or branch juvenile hall shall be under the management and control of the probation committee of the county. In all counties except counties having a population in excess of two million the internal affairs of the juvenile hall or branch juvenile hall shall be under the management and control of the probation officer of the county. The probation committee shall function in an advisory capacity to the probation officer in all counties except counties having a population in excess of two million."

As the City and County of San Francisco does not have a population in excess of two million, the internal affairs of the Juvenile Hall are under the management and control of the Probation Officer of the City and County of San Francisco, and the Juvenile Probation Committee of the City and County of San Francisco functions in an advisory capacity to the Juvenile Probation Officer.

You are therefore advised that it is not necessary that the chairman of the Juvenile Probation Committee sign warrants or resolutions in reference to appropriations or any of the other papers signed concerning the operation of the Juvenile Hall of the City and County of San Francisco. The internal affairs of the Juvenile Hall are under the management and control of the Juvenile Probation Officer and he is therefore the proper person to sign such warrants, resolutions and other papers, and you are advised accordingly.

There is no requirement in the State law that the members of the Juvenile Probation Committee shall be bonded. However, the Board of Supervisors by Ordinance No. 3756 as amended by Ordinance No. 4376, requires the members of the Juvenile Probation Committee to give bond in the sum of $2,500.00 each. This ordinance is presently in effect and you are therefore advised that the members of the Juvenile Probation Committee must give bond in accordance with the provisions of the ordinance.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM

To: Mr. George W. Ososke
Chief Probation Officer

No. 241

September 7, 1950

SUBJECT: PROPOSED ORDINANCE PROVIDING FOR MORE STRINGENT REGULATIONS ON SUBJECT OF NON-RESIDENCE OF EMPLOYEES FOR REASONS OF ILL HEALTH; POWER OF BOARD OF SUPERVISORS TO ADOPT; AUTHORITY OF DIRECTOR OF PUBLIC HEALTH

Dear Sir:

This office is in receipt of your request for the draft of an ordinance that would have the effect of requiring an officer or employee or member of his immediate family, as the case may be, to submit to a physical examination by a doctor to be designated by the Retirement Board, prior to action on any application for authority to reside outside of the city and county.

O P I N I O N

I have not prepared the draft of an ordinance as requested by you as it is my opinion that any ordinance that could be drafted imposing the foregoing requirement would be beyond the powers of the Board of Supervisors to enact and would be of no legal effect.

Section 9 of the Charter provides that "The powers of the city and county, except the powers reserved to the people or delegated to other officials, boards or commissions by this Charter shall be vested in the board of supervisors and shall be exercised as provided in this Charter." (Emphasis added.)

With reference to the particular subject matter, Section 7 of the Charter provides as follows:

> ".....provided, however, that any officer or employee of the city and county may live outside the City and County of San Francisco upon the authorization of the director of health, filed in the office of the civil service commission, and granted on account of the ill health of said officer or employee or the ill health of a member of the immediate family of said officer or employee."

By virtue of the foregoing provision of Section 7 the director of health has been delegated the power to authorize residence outside the city for reasons of ill health and implicit in this power is the power to adopt the procedure for the determination of the ill health of the employee or the member of his immediate family. The general power and the broad standard has been prescribed and established by the foregoing legislative enactment and the procedure to be followed, the evidence required and rules and

regulations to be adopted are all particular administrative powers delegated to and to be exercised by the director of public health. The board of supervisors is without power to require a different procedure or the adoption of more stringent regulations than those adopted by the said director. In this connection your attention is directed to the last paragraph of Section 22 of the Charter which reads:

> "Neither the board of supervisors, nor its committees, nor any of its members shall dictate, suggest or interfere with appointments, promotions, compensations, displinary actions, contracts, requisitions for purchases or other administrative recommendations or actions of the chief administrative officer, or of department heads under the chief administrative officer, or under the respective boards and commissions. The Board of Supervisors, and each board or commission relative to the affairs of its own department, shall deal with administrative matters only in the manner provided by this charter, and any dictation, suggestion or interference herein prohibited on the part of any supervisor or member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the power of hearing and inquiry as provided in this charter."

Also note the following language of the Supreme Court in the case of Kennedy v. Ross, 28 C. (2) 569, 575, 576, 577:

> "It is apparent from the provisions of the new charter that the framers intended to and did formulate a change in the usual concentration of control in the administration of municipal affairs, and thereby provided for a decentralization of powers. Only those powers of the city which are not reserved to the people or delegated to other officials, boards or commissions, are vested in the board of supervisors, to be exercised as provided in the charter."

* *

> "From the foregoing it is seen that the framers of the charter intended a division or separation of powers as between the board of supervisors, and the executive and administrative heads and departments. To make the matter more explicit, section 22 provides that except for the purpose of inquiry the mayor and the supervisors shall deal with the administrative service for which the chief administrative officer is responsible, solely through such officer, and that except for the purpose of inquiry, each department, board or commission, in the conduct of

the administrative affairs under its control, shall deal with such matters solely through its chief executive officer. 'Neither the board of supervisors,' the section provides, 'nor its committees, nor any of its members shall dictate, suggest or interfere with appointments, promotions, compensations, disciplinary actions, contracts, requisitions for purchases or other administrative recommendations or actions of the chief administrative officer, or of department heads under the chief administrative officer, or under the respective boards and commissions.....' Interference is deemed to be official misconduct."

"The intention of the framers is emphasized in Francis V. Keesling's 'San Francisco Charter of 1931' (April, 1933), page 45, where, in reporting the debate of the Freeholders regarding the limitation of the powers of the supervisors it is stated; 'It was the definite intention to effectively deprive the Board of Supervisors of all administrative powers.' This is further borne out by the provisions governing the budget and appropriations."

If the director of public health wished to adopt a different procedure for the determination of the ill health of the employee not in conflict with the charter and he felt that additional powers were required, he could recommend to the board of supervisors through the chief administrative officer the adoption of an ordinance giving him such powers under Section 20 of the Charter, which provides:

"The head of any department, through the chief administrative officer or the board or commission in charge thereof shall recommend to the board of supervisors such ordinances as may be required to carry out the powers vested and the duties imposed, and to establish or readjust fees or charges for permits issued to or work performed for persons, firms or corporations when these are subject to his or its jurisdiction,"

and the Board could by ordinance grant him such power under the following provision of Section 9: "The Board of Supervisors may by ordinance, confer on any officer, board or commission such other and additional powers as the board may deem advisable."

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TJB

To: Mr. John R. McGrath, Clerk
Board of Supervisors.

No. 242

September 7, 1950

SUBJECT: FARMERS' MARKET - GIFT AND INSTALLING OF FLAG POLE AND PLAQUE THEREON DEDICATED TO JOHN G. BRUCATO

Dear Sir:

I have received your request for an opinion as follows:

REQUEST

"A group of farmers who use the Farmers' Market are desirous of providing the Market site with a flag pole containing a plaque recognizing John G. Brucato for his sustained interest in the welfare of the market.

"Is there any legal objection to maintaining a privately financed flag pole and plaque, as referred to above, on the City's property?"

OPINION

Ordinance No. 3758, as amended, provides in part:

"Sec. 1. The Chief Administrative Officer is hereby authorized to establish in the City and County of San Francisco a farmers' market and to maintain the same, and to direct the operations of said market for the sale of surplus or distressed fresh fruits, vegetables, dried fruits, honey and nuts. . ."

Section 19 of the Charter, subdivision (d) provides:

"(d) To receive, on behalf of the city and county, gifts, devises and bequests for any purpose connected with or incidental to the department or affairs placed in its charge, and to administer, execute and perform the terms and conditions of trusts or any gift, devise or bequest which may be accepted by vote of the people or by the board of supervisors for the benefit of such department or purpose, and to act as trustees, under any such trust, when so authorized to

do by the board of supervisors. The title to all real and personal property now owned or hereafter acquired by gift, devise, bequest or otherwise, by and for the purposes of any board of commission shall vest in the city and county."

Section 2 of the Charter provides that the city may:

". . . receive bequests, gifts and donations of all kinds of property in fee simple or in trust for charitable and other purposes; . . ."

Additional telephonic information from you revealed that the mechanics of the proposal presume the contracting by private persons for the installation of the flag pole and plaque, and dedication thereof to the city.

The power of the Chief Administrative Officer, with reference to the Farmers' Market, is restricted to the purpose set forth in Ordinance No. 3758, which does not include the power to accept and allow the installation of monuments on the premises used as a market.

The Board of Supervisors may accept such a gift under Sections 2 and 19 (d) of the Charter and direct the placing thereon on the market premises in a suitable place. Such act may be by resolution of the Board, subject to whatever conditions may be imposed to protect the city in the process of installation of said monument.

You are therefore advised there is no legal objection to said proposal, but it must first be authorized by the Board of Supervisors.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Mr. T. A. Brooks
Chief Administrative Officer

CWH

No. 243

Sept. 7, 1950

SUBJECT: TAXATION OF PERSONAL PROPERTY BY THE ASSESSOR WHERE THE TRANSIT IN INTERSTATE COMMERCE HAS BEEN INTERRUPTED AND THE PROPERTY IS DETAINED IN THE CITY AND COUNTY OF SAN FRANCISCO; CLAIM FOR REFUND AND EXEMPTION BY HWA HSIN CEMENT COMPANY.

Gentlemen:

This office is in receipt of your letter wherein you attached a letter from the Bank of China, dated August 17, 1950, which is set forth in full below, and wherein you requested to be advised as to whether the request in behalf of the Hwa Hsin Cement Company for tax refund and future tax exemption may properly be granted.

The letter from the Bank of China reads as follows:

"A few years ago, the above mentioned company purchased various machinery from the Allis Chalmers Manufacturing Company, Milwaukee, Wis. for the purpose of enlarging and modernizing their cement manufacturing plant located near Hankow, China.

"Several shipments were made by the manufacturers via Chicago, Ill. to China through the West Coast, and just as the final shipment was en route in May 1949, cable instructions were received by Allis Chalmers and us to store this material at the port of shipment. This action was taken by our clients due to the internal upheavals going on at that time in Central China and are still prevailing in the whole China proper.

"Shipment in question consisted of:

"21 pieces of pipe fittings and
4 boxes of steel wheel sprockets

and is stored with the Gibralter Warehouse, 1265 Battery Street, San Francisco under their receipts Nos. 3747 and 3748 dated June 9th, 1949.

"At the insistence of Mr. Russell L. Wolden, Assessor of the City and County of San Francisco we paid on behalf of our clients the sum of $98.60 under receipt No. 51267 as taxes for personal property assessed as of March 6th, 1950 for the fiscal year ending June 30th, 1951.

"As this material is destined for China but due to the unsettled conditions in that country, we are compelled to

have the merchandise stored at the port of exit. Therefore, we respectfully request that this distressed cargo receive a special dispensation in the form of tax exemption for the future and refund for the tax paid. We wish to assure you that shipment will be made as soon as circumstances permit.

"Should any detailed information be required, kindly notify us and we will submit the same immediately."

O P I N I O N

The rule of law governing the taxation of property where there has been a break in transit in interstate commerce is stated generally as follows:

> "It is universally agreed that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the states through which it passes. Where, however, the interstate transit is broken or interrupted in a particular state, the question arises whether the property may thereupon be subjected to local taxation therein. In this situation the principle has been adopted by the Supreme Court of the United States and adhered to by the lower Federal courts and the courts of the various states that if the break in the interstate journey was caused by the exigencies of conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the continuity of the transit remains unimpaired, and the immunity of the goods from state or local taxation is consequently unaffected; but if the interruption in the journey occurred for purposes connected with the business convenience or profit of the taxpayer, or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation." (171 A.L.R. 283, 284.)

This question has been discussed by the California courts in the cases of VON HAMM-YOUNG COMPANY v. CITY AND COUNTY OF SAN FRANCISCO, 29 Cal. (2d) 798 and EXPORT LEAF TOBACCO CO. v. COUNTY OF LOS ANGELES, 89 Cal. App. (2d) 909, both of which cases involved the taxation of property which was in interstate commerce, the transportation of which was interrupted because of war conditions after Pearl Harbor.

In these cases the property appeared to be detained temporarily because of war conditions and efforts were made to have the property forwarded to the place of its ultimate destination (VON HAMM-YOUNG case), or returned to the place of origin of shipment (EXPORT LEAF TOBACCO CO. case), and the property was so transported within a reasonable period of time.

The court stated in these cases that whether the interruption in the continuity of transit was such as to take the property out of interstate commerce and therefore make it assessable and taxable by the local authorities was a question of fact to be determined by viewing all of the circumstances in connection with the interruption of transit, the conditions at the time, the intention of the owner, etc.

The circumstances in connection with the interruption of transit of the goods in the instant case appear substantially different from those in the VON HAMM-YOUNG case and the EXPORT LEAF TOBACCO CO., case. In the latter cases, the United States was actually at war and shipping was under the control of the government authorities and the property in question could not be shipped without the permission and consent of the governmental authorities and the interruption in transit was occasioned by those conditions. In the instant case it appears that the transit of the property was stopped voluntarily by the owner in San Francisco because the owner did not desire to ship the property to Hong Kong although such shipment was physically possible had the owner so desired. Further, in the VON HAMM-YOUNG case and the EXPORT LEAF TOBACCO CO., case it appears that the property was within a reasonable time either shipped to the place of their ultimate destination or returned to the place of their origin. In the instant case, from the demand made by the Bank of China for an exemption as to future taxation, it appears that the owner intends that the property be detained in San Francisco for an indefinite time in the future, and it may well therefore be concluded that the interstate commerce has ended and that the property has come to rest in San Francisco and is therefore legally assessable and taxable by the local authorities.

As stated above, whether the property has come to rest within San Francisco and is therefore assessable and taxable by the local authorities is a question of fact. Unless the Board of Supervisors were to find as a fact that the interstate transit of the property had not been interrupted for the business convenience of the taxpayer and that the property was still to be considered as in interstate commerce, the claim for the refund of taxes paid and for the exemption as to future taxes should be denied.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM

To: Board of Supervisors
Attn: Finance Committee

cc: Office of the Mayor

Mr. Russell L. Wolden, Assessor

No. 244

September 11, 1950

SUBJECT: BRIDGET CUNNINGHAM'S OLD AGE SECURITY ELIGIBILITY - DEPARTMENT OF PUBLIC WELFARE - TREASURER - RETURN OF MONEY GIVEN TO CITY.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

"The above named is applying for Old Age Security and an attempt is being made to establish her eligibility.

"Mrs. Cunningham informs us that some time following the death of her husband, Patrick Cunningham, who was employed by the city as a laborer, and who died on October 22nd, 1934, she received a large sum of money from the city. For some reason Mrs. Cunningham did not feel that she was entitled to this money and at some later date insisted upon returning it.

"Can you verify Mrs. Cunningham's statement, giving us the amount which she received, the date she received it, and the date and amount when she returned it.

"Also can you tell us whether Mrs. Cunningham would still be entitled to receive this money now."

OPINION

I will first answer the question as to the verity of Mrs. Cunningham's statement to you.

Mr. Leland Guth of the San Francisco City and County Employees' Retirement System has advised me that the Retirement System records reveal that Patrick Cunningham died on October 22, 1934. That on November 15, 1934, the death benefit of six months salary plus accumulated employee's contributions in the sum of $1,409.79

were paid to Bridget Cunningham as his surviving widow. In addition Mrs. Cunningham received from the City and County the sum of $4,418.65 as settlement of a claim for workmen's compensation benefits arising from her husband's death.

Upon conferring with Mr. John J. Goodwin, Treasurer of the City and County of San Francisco, he advised me that his office on June 24, 1947, had received from Mr. John J. O'Toole, my predecessor, a check No. 278904 drawn by Mrs. Cunningham on the Mission branch of the San Francisco Bank in the sum of $4,600 which was deposited as conscience money in the General Fund. It would appears that Mrs. Cunningham had some doubts in her own mind whether, in conscience, she was rightfully entitled to the amount of the death benefit settlement paid to her under the workmen's compensation act.

In the midst of a drab legal opinion, I must infuse a moral note, as Mrs. Cunningham's action is so rarely encountered especially when public funds are involved. This good lady, at the time she turned over to the City $4600,was in very ordinary circumstances, to put it mildly. It was explained to her that the money without doubt legally belonged to her, yet she refused to keep it. How very refreshing it is to encounter a person of such high moral character. Now she is in need of funds and it distresses me to continue this opinion, as I am aware of the conclusion I must legally reach.

In response to your second question as to whether Mrs. Cunningham would now still be entitled to receive this money, my answer is in the negative.

Mrs. Cunningham returned a large part of the money she received on her husband's death to the City and County. It was in the nature of a completed gift to the City and County and, apparently having no specific purpose, was thereupon properly placed in the General Fund by the Treasurer. Mrs. Cunningham cannot at this time either recall or claim a return of said moneys since there was an unqualified and unconditional delivery of the check made to the City and County.

Mrs. Cunningham, for the foregoing reasons, is not now entitled to receive this money.

Respectfully submitted,

Public Welfare Department
Attn: Miss Helen Stray

DION R. HOLM
City Attorney

LTK

No. 245

September 11, 1950

SUBJECT: PERSONAL PROPERTY TAX; WAIVER OF EXHIBITION EXEMPTION BY FAILURE TO FILE AFFIDAVIT FOR EXEMPTION REQUIRED UNDER SECTION 254 OF THE REVENUE AND TAXATION CODE.

Dear Sir:

This office is in receipt of your letter wherein you state that the Finance Committee of the Board of Supervisors request that it be informed as to whether the cancellation of personal property taxes levied under the circumstances set forth in the letter of the Hawaii Visitors Bureau, dated August 11, 1950, to the Supervisors, is proper.

The letter from the Hawaii Visitors Bureau reads as follows:

> "At the suggestion of Mr. Russell L. Wolden, Assessor of your City, we are herewith filing an appeal for review and cancellation of personal property tax on our "Public Health Exhibit" now in storage at G. W. Thomas Drayage and Rigging Company, Inc., 114-14th Street, San Francisco.
>
> "Your Statutes under the Revenue and Taxation Code Section 213 states three conditions for exemption from such a tax. It is our opinion that:
>
> "1. We qualify for exemption under Section 213(c), in as much as we are a non-profit, quasi-governmental, civic organization and a committee of the Chamber of Commerce of Honolulu. As such, we are exempt from all Federal as well as Territorial and Municipal Taxes.
>
> "2. The said property was brought to California for an educational purpose and for that purpose only. Section 213(a)
>
> "3. The said property is temporarily stored at the aforementioned Warehouse to facilitate the movement of the exhibit when the need arises. The cost of transportation to and from Honolulu prohibits the shipping of the exhibit at the

present time. Section 213(b).

"We would not file an appeal unless we felt that the exhibit is exempt from taxation.

"Your '1950 Report of Personal Property in Warehouse' did not inform us that we were required to file exemption for personal property temporarily warehoused in your city - 'between noon on the 1st. Monday in March and 5pm on the last Monday of May'. However, we did report to Mr. Wolden the original cost of the exhibit.

"We therefore submit this appeal for review."

OPINION

The Hawai. Visitors Bureau bases its request for the cancellation of personal property taxes on its "Public Health Exhibit" on the basis that said exhibit is exempt from taxation under the provisions of Section 213 of the Revenue and Taxation Code, which is generally designated as the "exhibition exemption", and which grants an exemption of certain property under specified conditions.

Assuming that the exhibit above referred to did fall within the class of property exempt under Section 213 of the Revenue and Taxation Code, I am of the opinion that the personal property taxes levied on the exhibit may not be cancelled because the taxpayer failed to follow the required procedure in claiming the exemption, to wit, the filing of an affidavit for the exhibition exemption, and therefore waived its claim to the exemption.

Section 254 of the Revenue and Taxation Code, under the general article entitled "Procedure to Claim Exemptions" reads as follows:

"Return and affidavit for church, orphanage, college and exhibition exemption.

"Any person claiming the church, orphanage, college, exhibition, or welfare exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the board." (Emphasis ours)

The affidavit required by Section 254 of the Revenue and Taxation Code must be filed with the Assessor between noon on the first Monday in March and five P. M. on the last Monday in May. (Section 255, Revenue and Taxation Code)

Section 259 of the Revenue and Taxation Code provides:

> "Same; For exhibition exemption. The affidavit for the exhibition exemption shall state the facts showing that the property comes within all the descriptions entitling it to the exemption."

Section 260 of the Revenue and Taxation Code provides:

> "Failure to follow required procedure: Waiver of exemption. If any person claiming any exemption named in this article, fails to follow the required procedure, the exemption is waived by the person."

You are therefore advised that under the provisions of Section 260 of the Revenue and Taxation Code, the Hawaii Visitors Bureau, by failing to file an exhibition exemption affidavit, as required by Section 254 of the Revenue and Taxation Code, waived the exemption granted by Section 213 of the Revenue and Taxation Code. The personal property tax levied on the exhibit may not therefore be cancelled by the Board of Supervisors. In view of the nature of the property and worthy auspices controlling it, I endeavored to reach a different conclusion but could not legally do so.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

Clerk of the Board of
Supervisors

cc - Assessor
LSM

No. 246

Sept. 11, 1950

SUBJECT: LEAVES OF ABSENCE OF HETCH HETCHY EMPLOYEES TO PARTICIPATE IN CIVIC AFFAIRS, ILLEGAL.

Dear Sir:

I am in receipt of your request for an opinion as to whether Hetch Hetchy Water Department employees, who have established residence in Tuolumne County, will be granted leaves of absence with pay in order that they may participate in local civic affairs entailing day time participation.

O P I N I O N

I am cognizant that it is the patriotic duty of all citizens in order to foster and preserve our democratic way of life to take active interest and participate in national and local affairs, other than City and County politics, as participation in the latter is prohibited by terms of the Charter of the City and County of San Francisco. The Charter, which is the legislative enactment of the people, is the organic law of the City and County in the conduct and administration of its affairs and strict compliance with such Charter is required.

I wish to advise you with respect to the subject of your inquiry of the restrictions and requirements of the Charter, rules of the Civil Service Commission of San Francisco and the Annual Salary Ordinance of San Francisco.

1. Section 153 of the Charter provides that leaves of absence of officers and employees of the City and County shall be governed by rules established by the Civil Service Commission. A review of the rules of the Civil Service Commission with respect to leaves of absence with pay discloses that the type of leave with pay which is the subject of your inquiry is not sanctioned.

2. It is provided in Section 150 of the Charter, "No officer or employee shall be paid for a greater time than that covered by his actual service."

3. Section 1.6 of the Annual Salary Ordinance provides for the normal work schedule for services of employees whose compensation is fixed on a monthly basis. This section reads:

> "A normal work day for employees whose compensations are fixed in the schedules of compensation on a monthly basis shall consist of a tour of duty of eight hours work completed within nine hours and a normal work week shall consist of such tours of duty on each of five consecutive days a week; provided, however, that in departments that do not have normal seven day operation, a normal work week shall consist of such tours of duty on each Monday through Friday, inclusive. The compensations fixed in the schedules of compensation adopted by the board of supervisors, pursuant to the provisions of Section 151 or Section 151.3 of the Charter on a monthly basis are in full payment for services rendered during a calendar month under this normal work schedule."

As for working conditions according to collective bargaining agreements for respective classifications of employment you are referred to section 8.1 to 8.47 inclusive of Ordinance #6157 (series 1939) adopted by the Board of Supervisors July 24, 1950 and approved by the Mayor July 26, 1950.

4. It is also provided in Section 150 of the Charter that all personal services shall be paid by warrant on the basis of a claim, bill, timeroll, or payroll, approved by the head of the department or office employing such service.

5. Lastly, it is provided in Section 86 of the Charter that "Every officer who shall approve, allow, or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city and county individually and on his official bond the amount of the demand so illegally approved, allowed, or paid."

Accordingly you are advised that Water Department employees who are residents of Tuolumne County cannot legally be granted leaves of absence with pay in order to participate in local civic affairs.

Respectfully submitted,

DION R. HOLM
City Attorney

JGMcB

To: Civil Service Commission
Attn: Mr. William L. Henderson
Personnel Director & Secretary.

cc: Mr. James H. Turner,
Manager of Utilities.

Mr. A. O. Olson,
Chief Engineer & General Manager,
Water Department, 425 Mason St., S.F.

No. 247
September 12, 1950

SUBJECT: RETIRED CITY EMPLOYEE CAN SUBMIT A BID TO SELL LUMBER TO THE CITY AND COUNTY.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Your opinion is requested in the matter of award of a contract to a firm owned by, or employing a retired City employee.

"Section 222 of the Charter prohibits the interest of any Supervisor, officer or employee of the City in the performance of any contract the consideration of which is payable from the treasury.

"There is for consideration the award of approximately $250.00 worth of lumber to a firm in Sonora, Calif., owned by a retired employee of the Hetch Hetchy Bureau.

"May the Purchaser of Supplies legally consider this bid?"

O P I N I O N

Section 222 of the Charter of the City and County of San Francisco does not by its terms include retired employees and therefore the sale of an article by a retired employee to the City is not prohibited under the section.

Section 163 (a) of the Charter prohibits retired employees from receiving payment for services rendered to the City and County after retirement, with certain exceptions. The transaction set forth in your letter contemplates a sale rather than the performance of services and hence would not be prohibited within the meaning of this section.

It is my opinion therefore that the Purchaser of Supplies may legally consider the bid of a retired employee for the sale of lumber to the City and County of San Francisco.

Respectfully submitted,

TMO'C

DION R. HOLM,
City Attorney.

To: Mr. H. H. Jones
Purchaser of Supplies

cc: Office of the Mayor

Opinion No. 248
September 12, 1950

SUBJECT: VALIDITY OF REQUIREMENT OF HEALTH CODE THAT MILK SOLD IN SAN FRANCISCO BE PASTEURIZED WITHIN CITY LIMITS.

Dear Sir:

I have your request for an opinion as follows:

"Will you please advise this office as to whether under present state law the City's requirement by ordinance that milk sold in San Francisco be pasteurized within the City limits is valid or if now, milk properly pasteurized in another community might be distributed in San Francisco.

"It is my understanding that the position of the State Department of Agriculture is that a provision of a local ordinance requiring pasteurization within a limited area is no longer effective."

O P I N I O N

The provision of our Health Code to which you refer was held valid and a proper exercise of the police power in the case of WITT v. KLIMM, 97 Cal. App. 131, decided by the District Court of Appeal in 1929. At that time the said provision read as follows:

"All milk intended for human consumption, in San Francisco, that comes from cows that have not passed the tuberculin test, except when sold in bulk to the wholesale trade, shall be pasteurized in San Francisco in accordance with the method set forth herein."

It now reads:

"All milk except certified milk intended for human consumption in San Francisco shall be pasteurized in San Francisco in accordance with the methods set forth herein."

Since the decision in the WITT case, there have been substantial changes in the State law and a fairly extensive line of court decisions in which substantially similar provisions of ordinances of other cities have been held invalid. In the case of LA FRANCHI v. SANTA ROSA, 8 Cal. (2d) 331 (1937), the Supreme Court considered the following provision of an ordinance of the City of Santa Rosa: "It shall be unlawful for any person to sell, offer for sale, distribute or have in his possession for sale or distribution within the City of Santa Rosa any milk intended for human consumption which has been pasteurized outside the corporate limits of the city." The court held such provision invalid in its application to the plaintiff who owned a pasteurizing plant located five miles from the City of

Santa Rosa. The court distinguished the WITT case by pointing out that in the WITT case milk was being brought into the city from another inspection district, whereas, in the case it had under consideration, the appellant's business was located within the inspection district of the City of Santa Rosa.

To the same effect was the case of VAN GAMMEREN v. CITY OF FRESNO, 51 Cal. App. (2d) 235 (1942), in which the District Court of Appeal held that the City of Fresno could be enjoined from enforcing a similar ordinance of the City of Fresno against the plaintiff who owned a pasteurizing plant located four miles from the City of Fresno and who desired to sell the product of his plant in Fresno. The court pointed out that plaintiff's plant was inspected by the City of Fresno's inspection officers and distinguished the WITT case in the same manner as the court did in the LA FRANCHI case.

In the case of MERIDIAN, LTD. v. SIPPY, 54 Cal. App. (2d) 214 (Aug. 1942), the District Court of Appeal held invalid that portion of an ordinance of the City of Stockton which provided: "In no case shall a permit be issued to any person, firm, association or corporation to sell . . . any milk in the city of Stockton unless the dairy, source of supply or place of origin is regularly inspected by the health officer or his authorized representatives." The court concluded that this ordinance conflicted with the state law governing the inspection of milk and was therefore invalid.

More recently in 1948 the Superior Court of Sonoma County enjoined the enforcement of an ordinance of the City of Santa Rosa which provided that no pasteurized milk could be sold in the City of Santa Rosa which had not been pasteurized in a plant located within ten miles of the City Hall of the City of Santa Rosa, and in 1949 the Superior Court of Solano County enjoined the enforcement of ordinances of the City of Vallejo and Benicia which sought to prohibit the sale of pasteurized milk in the city that had not been pasteurized within the city limits. In these Superior Court cases the milk was pasteurized in other inspection districts.

The foregoing court decisions since the WITT case holding invalid and enjoining the enforcement of ordinances substantially identical to ours did so on two major grounds: That such ordinances conflicted with paramount state law and that they created unlawful trade barriers being unsupported by any proper legislative objectives relating to the public health and safety.

Again adverting to the WITT case, I note that the main consideration of the court was the right of the city to inspect its own milk supply. In its opinion, the court points out:

"If petitioners' contention be sound and the Health Department of the City and County of San Francisco be required to go to Colma and there inspect petitioners' pasteurization plant, there would be nothing to prevent all outside dealers in milk from requiring the same thing, and the Health Department would be called upon to make inspections of pasteurization plants in many of the other counties of the state, such as Alameda, Solano, Contra Costa and possibly others. It goes without saying that such a requirement of the Health Department would not only be unreasonable and exceedingly expensive, but it would seriously impair, if not wholly destroy, the efficiency of the entire inspection service."

At that time the state law on the particular question, Section 5, Statutes 1927, p. 1944 (1927 Pure Milk Law) provided "That a person, firm, corporation or association, which is authorized to sell market milk within the jurisdiction of a milk inspection service may sell market milk from the same supply, of the same quality, in similar containers, and under the same label in territory outside the jurisdiction of any milk inspection service, if local ordinances are not thereby violated, and also in territory within the jurisdiction of any other milk inspection service, <u>if the consent of said other milk inspection service has been previously obtained.</u>" (Emphasis added) Subsequently, this section of the law was amended and is now Section 476 of the Agricultural Code, which reads as follows:

"§476. SUPERVISION OF SALE OF GUARANTEED OR GRADE A MILK: PERMIT: SALE OF UNGRADED MARKET MILK. It is unlawful to sell any milk as, or under the representation of, guaranteed or grade A milk, except under the supervision of a milk inspection service approved by the director or established and conducted by the director. A person authorized to sell market milk within the jurisdiction of a milk inspection service may sell market milk from the same supply, of the same quality, in similar containers, and under the same label in territory outside the jurisdiction of any milk inspection service, if local ordinances, not in conflict with the provisions of this division, are not thereby violated, and also in territory within the jurisdiction of any other milk inspection service; provided, that a permit in accordance with §§506 and 507 has been previously abtained. It is unlawful to sell in any city or county or any combination of cities and counties in which a milk inspection service has been established, either by or with the approval of the director, any market milk other than graded milk as provided in this division."

Also pertinent are the provisions of Section 500 of the Agricultural Code, which read:

"§500. DELIVERY OR SALE OF MARKET MILK WITHIN JURISDICTION OF TWO OR MORE CITIES OR COUNTIES: DESIGNATION OF COUNTY OR CITY TO CONDUCT INSPECTIONS: MATTERS TO BE CONSIDERED: LOCAL ORDINANCES NOT TO BE VIOLATED: ENFORCEMENT. Whenever a producer or distributor delivers or sells market milk within the jurisdiction of two or more cities or counties, the director, after an investigation and consultation with the health officer of each county and city involved, shall designate the county or city which shall conduct the dairy farm and milk products plant inspection. The director, in making such designation, shall in addition to other matters considered by him, take into consideration the geographical convenience of each county and city rendering such inspection, and the percentage of market milk and milk products sold or delivered within each. All market milk and milk products so inspected may be sold and delivered within the jurisdiction of any county and city; provided, that applicable local ordinances of such county or city are not thereby violated. The county or city designated by the director to render such inspection shall enforce all applicable local ordinances of each county and city into which such market milk and milk products are sold or delivered."

and the following provision of Section 490:

"§490. APPROVED MILK INSPECTION SERVICES: DEFINED: AUTHORITY OF MUNICIPALITY OR COUNTY TO FIX HIGHER STANDARDS. For the purpose of this division 'approved milk inspection service' means a milk inspection unit and laboratory maintained in connection with a county or city or combination of either or both for the purpose of grading and inspecting market milk produced for shipment to and sale or distribution within the jurisdiction of such approved milk inspection service, conformable to the provisions of this division and the rules and regulations established by the director, which inspection service shall be approved in writing by the director.

"No provision of this division, except subdivision (b) of §492, or any rule and regulation of the director is a limitation on the power of a municipality or county to provide for reasonable additional regulations, not in conflict therewith, requiring standards higher than the minimum requirements for the grades of market milk established in this division; but any municipal or county ordinance or regulation requiring higher standards for milk fat and solids not fat than those established in this division shall apply only to market milk after standardization by a milk distributor."

It appears clear that under the foregoing provisions of the state law, the cities do not have the present right to inspect their entire milk supply at its place of origin so this prop of the WITT decision has been removed by the Legislature. Thus emasculated of

its primary objective, are there other legislative objectives of the requirement of local pasteurization relating to the preservation and safeguarding of the public health upon which its validity may be predicated? Specifically stated; is milk that is pasteurized elsewhere as pure and as wholesome and is the pasteurization as effective in accordance with the standards of our ordinance when sold in San Francisco as when originally pasteurized? If this question were to be answered in the negative and it could be shown that by reason of transportation to the city the pasteurization necessarily or would reasonably tend to lose its effectiveness, then I believe that there would be a present basis for enforcement of the requirements of the ordinance that the milk be pasteurized or re-pasteurized here. Under Article X, Section XI of the Constitution, and Section 490 of the Agricultural Code, the city still has the power to enact and enforce ordinances not in conflict with the state law relating to the production, sale and distribution of milk. This right was recognized and affirmed in the case of NATIONAL MILK PRODUCERS ASSOCIATION v. CITY AND COUNTY OF SAN FRANCISCO, 20 Cal. (2d) 101 (1942) which upheld the right of the City and County to require that all milk sold for human consumption be pasteurized as a proper police regulation not in conflict with state law and certainly it is implicit in that case that the right to require pasteurization includes the right to require effective pasteurization and to adopt such regulations and laws as to insure that the pasteurization would be effective at the time of sale.

However, in the cases cited herein wherein the local pasteurization requirements were held invalid, a showing was made that by reason of the method of transportation and safeguards taken, the milk pasteurized elsewhere was at the time of its sale in the city as pure and wholesome and in as full compliance with city standards as milk pasteurized therein.

The courts therefore found that the requirement had no relation to a standard of quality for milk or to the public health or safety and was invalid as erecting an unlawful trade barrier. If, in an attempt to invoke our ordinance, the same showing can be made by the distributor, it appears likely that a similar holding would be made and that its enforcement would be enjoined.

In view of the present dubious validity of the provision of our ordinance herein discussed, at least insofar as those milk distributors are concerned who by reason of their method of production and transportation can negative the only basis upon which I can conceive its validity being sustained, I would recommend a discussion and appraisal of the situation with the Health Department with a view to amendment of the Code so that whatever evil may still exist may be guarded against by provisions conformable to existing state law.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

TJB

To: Mr. Thomas A. Brooks,
Chief Administrative Officer.

No. 249
September 12, 1950

SUBJECT: TRAFFIC SIGNALS; TYPE OF INSTALLATION CONSTITUTING NEGLIGENCE.

Gentlemen:

This office is in receipt of a request for an opinion as follows:

"I request a legal opinion in the matter of timing traffic actuated signals under conditions employing a 'pedestrian pushbutton' at an intersection where vehicles also are required to actuate the signals by means of pavement detectors.

"Two methods of traffic signal timing are technically possible:

Method 1. Actuation by either cross street vehicles or 'pedestrian push-button' would always give a minimum green period sufficient for pedestrians to cross main street if starting at the beginning of green. (This is the method now being used to time traffic actuated signals in San Francisco and to a pedestrian is the same as all signals in the city.)

Method 2. Actuation by a cross street vehicle would give a minimum green light sufficient for one vehicle to cross, but insufficient for pedestrians to cross. Actuation by 'pedestrian push-button' when the cross street signal was red would always be required by the pedestrian to get a sufficient crossing green period. (This method has been used in other jurisdictions and by the State Division of Highways. It has been suggested for use in San Francisco and is being given serious consideration.)

"Method 2 is the most desirable from the standpoint of automobile drivers and in some cases is required if high vehicular congestion or unnecessary vehicular delay is to be avoided. My question stems, however, from the fact that a requirement that the pedestrian must always push a button at a particular intersection will make that intersection an exception rather than the rule when compared with signal operation of the majority of intersections.

"In spite of the presence of a sign some pedestrians will consciously or unconsciously expect or assume that

when starting with the beginning of the green light they will always have sufficient time to cross.

"QUESTION: Under Method 2, if a pedestrian fails to press a push-button and in attempting to cross the street within the small amount of time given for a vehicular crossing is involved in an accident, can the City be held liable for contributory negligence by reason of the fact that sufficient pedestrian crossing time was not provided?

"If additional technical information is required by your department, it may be obtained from the Traffic Engineering Division of the City Engineer's Office."

O P I N I O N

The rights of pedestrians at either marked or unmarked crosswalks are covered by Sections 560 and 563 of the Vehicle Code. These sections read as follows:

"§ 560. Pedestrians' Right of Way at Crosswalks.
(a) /Yielding of right of way to pedestrian./
The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.

"(b) /Stopped vehicle not to be overtaken and passed./
Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

"§ 563. Pedestrians at Controlled Intersections.
(a) /Crossing against red or stop signal./
At intersections where traffic is controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal.

(b) /Crossing between adjacent controlled intersections./ Between adjacent intersections so controlled pedestrians shall not cross at any place except in a crosswalk."

It is evident from the provisions of Section 560 quoted above that once a pedestrian has started crossing a roadway with the green light in his favor, it is the duty of the driver of a vehicle to permit him to proceed safely, even though the light may have turned against the pedestrian. This situation is not unusual even in cases where automatic signals are now being used in San Francisco. Pedestrians often start crossing the street one or two seconds before the light changes from green to red. In many cases the light changes from red to green in the opposite direction permitting a motorist under normal conditions to proceed. However, if the pedestrian is still in the crosswalk it is the duty of the motorist to yield the right of way and permit the pedestrian to safely cross the street.

The situation which you present is similar in many respects to that indicated above.

I may state in passing that the term "contributory negligence" is applied to a litigant who is negligent when the person causing the accident is also negligent. It presuppoes (to take a comparable situation) that a motorist is negligent and that the negligence of the pedestrian also contributes to the causing of the accident or injury. Thus, the term "contributory negligence" is used. It is necessary, therefore, to determine whether the signals suggested by Method 2 would constitute negligence on the part of the City and County of San Francisco should an accident occur. It is evident from the reading of Section 560 that the driver of a motor vehicle must yield the right of way to a pedestrian, assuming the latter started with a green light. If the driver of the vehicle conforms to the law no accident can occur, and therefore there can be no question of negligence on the part of anyone. Should the driver of the vehicle fail to yield the right of way and an accident occurs, the negligence would be on the part of the driver of the vehicle.

It is likewise true under Section 563 that a pedestrian is prohibited from crossing at an intersection against a red, or stop signal.

Should a pedestrian proceed accoss the intersection with the signal against him, the negligence would be his, and not that of the City.

#4

You are therefore advised that under the circumstances stated in your request that the City and County of San Francisco would not be negligent in the event of an accident occurring.

Respectfully submitted,

DION R. HOLM
City Attorney

BJWJr

TO: Sherman P. Duckel, Director
Department of Public Works

cc: Mr. T. A. Brooks,
Chief Administrative Officer

Opinion No. 250
September 13, 1950

SUBJECT: McCOPPIN SQUARE, USE OF PORTION THEREOF FOR ERECTION OF PUBLIC LIBRARY.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"The Recreation and Park Commission has before it a request from the Library Commission for the transfer of a parcel of land in the southwest portion of McCoppin Square, 22nd Avenue and Taraval Street.

"The Library Commission wishes to erect a branch public library on the property. Would you kindly favor this Commission with a written opinion on the following:

"1. Can the Recreation and Park Commission legally transfer jurisdiction of a portion of McCoppin Square to the Library Commission.

"2. If the Recreation and Park Commission cannot or does not wish to transfer the land to the library Commission, can the Library Commission, with this Commission's consent, legally erect a public library on the site, even though it does not have title to the land."

O P I N I O N

1. In checking the grant under which McCoppin Square was reserved to the City and County of San Francisco, I find that it was reserved by the Outside Land Committee under provisions of Order 800 for park purposes. Therefore it is clear that it is property which was dedicated for park purposes. As a consequence I must advise you that the answer to your first question is "No". Without going into discussion of the reasons for this answer, I have inclosed herewith various opinions written by me during the last year and one-half concerning property dedicated to park purposes, in which the same question has been answered. These opinions are numbered and dated as follows:

No. 28	6/6/49
No. 110	1/30/50
No. 121	2/8/50
No. 144	3/27/50

2. Since I have ruled on Question 1 that you cannot transfer jurisdiction of the property to the Library Commission, the only

part of your second question remaining to be answered concerns the right of the Library Commission, with your consent, to erect the library in question on that portion of McCoppin Square referred to in your request.

This point is not a new and novel one, having been before the Chancery Court in England and having been presented to the California Supreme Court. In both of these cases to which I will refer later, the court decided that a library could be erected on property dedicated to park purposes.

One of the earlier cases on the subject was ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND, 2 Ch. Div. 634. This case is squarely in point with the question presented in your request, since it dealt with the right of a municipality to erect a free library upon land set aside for a public park. The language used in this case so appropriately summarizes the reasons for permitting the erection of a library on park property that I have lifted portions of it and I have reproduced it herewith:

> ". . . . 'The original park was appropriated as "a place of recreation," and, according to the act under which the land now in question was acquired, it must be used "as public walks or pleasure-grounds." These words are not to be construed too narrowly. It is admitted by the information that some buildings are allowable, and the prayer is, as it seems to me, quite correct. The corporation is in the position of a trustee, and the question is whether in building a museum and library it is improperly executing a trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation, in a reasonable exercise of their discretion, consider conducive to it. It is admitted that the erection of a conservatory is allowable, and it is an erection which you would expect, as a matter of course, to find in first-rate pleasure-grounds. The erection of a free museum containing botanical specimens and other curiosities appears also to be unobjectionable. A library into which people may turn if the weather becomes unfavorable also seems allowable if bona fide intended for the use of persons frequenting the grounds, as it will tend to promote the convenient use of the grounds. I think, therefore, that the exception in the order ought to be extended, so that the erection of a free library may not be prohibited.'"

This language, which was cited from the Chancery Court, is cited favorably in the California case of SPIRES v. CITY OF LOS ANGELES, 150 Cal. 64 at pages 68 and 69. The Supreme Court in this

California case after favorably commenting on the language quoted above, concludes as follows:

> "Under the view we entertain on the subject, the city of Los Angeles has a right, notwithstanding it be conceded that Central Park was dedicated for the benefit and enjoyment of the public, to build a public library on it, and the court was in error in granting a decree to plaintiff enjoining it and its officers from doing so."

Therefore, I advise you that if your commission consents to it, the Library Commission, without having title to the land, may be permitted to erect the library planned on that portion of McCoppin Square referred to in your request.

Respectfully submitted,

DION R. HOLM,
City Attorney.

BJWJ

To: Recreation and Park Department,
Attn: Mr. Edward A. McDevitt, Secretary.

No. 28

June 6, 1949

SUBJECT: ABANDONMENT AND SALE OF PARK LAND UNDER SECTION 41.1 OF THE CHARTER: RIGHT TO DISPOSE OF COLUMBIA SQUARE AND PROCEDURE TO BE FOLLOWED.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

> "The Park Commission is considering the advisability of disposing of Columbia Square which is located at Seventh and Folsom Streets. However, at this time we would like to have the legality of such action verified.
>
> "It is our understanding that Section 41.1 of the Charter of the City and County of San Francisco authorizes the sale of park land under certain circumstances and provides that the general laws of the State of California regulates such action.
>
> "Will you please advise us as to our right to dispose of Columbia Square and the procedure to be followed in the event the Park Commission decides that Columbia Square is no longer needed for park purposes."

O P I N I O N

Section 41.1 of the Charter which became effective in 1949 provides for the sale, abandonment or discontinuance of use of land held for park purposes under certain conditions. The conditions are the following:

1) The lands must no longer be needed for park or recreational purposes.

2) The abandonment or change of use shall not cause the reversion of such lands to private ownership or cause the forfeiture of the ownership thereof in fee by the City and County of San Francisco.

3) The use of park lands may not be discontinued where the park lands were acquired in any proceeding wherein a local assessment based on benefits was levied to provide funds for such acquisition.

4) The general laws of the State of California authorizing municipal corporations to abandon or to discontinue the use of land for park purposes, authorizing the sale or

other disposition of such lands, and providing procedures therefor, shall be applicable to the City and County of San Francisco and to all lands held or used by it for park purposes and shall govern and control exclusively in respect thereto.

There are three statutes of the State of California dealing with the abandonment and discontinuance of parks. These statutes are the following:

A. MUNICIPAL PARK ABANDONMENT LAW OF 1939. (Stats. 1939, Chapter 1107; DEERING'S GENERAL LAWS, Act 6374.)

Section 1 of this Act provides in part as follows:

"Whenever any land situate within the corporate limits of a municipal corporation has been dedicated for park purposes by the recording of a plat or map in the office of the county recorder, or otherwise, or when any land so situated has been purchased for park purposes, and the legislative body of said municipal corporation finds that said tract of land or a portion thereof is not appropriate, convenient or necessary for park purposes; that such purported park has not been used by the public for park purposes; that no consideration has been paid therefor except by said municipal corporation; and that no public funds have been expended to improve the same as a park, said legislative body may abandon and discontinue said purported park or a portion thereof and may sell and convey the land therein."

From the above section, it will be noted that this Act is restricted to lands which have been dedicated for park purposes but which are not appropriate, convenient or necessary for park purposes, have not been used for park purposes and on which no public funds have been used to improve the same as parks.

The procedure for the abandonment of such purported parks is the following:

1) The legislative body must adopt a resolution of intention to abandon or discontinue such purported park describing the said purported park and fixing a time when said body will meet to take final action thereon, which time must be at least thirty (30) days after the adoption of said resolution. (Section 2)

2) Said resolution must be published and posted as required by the statute. (Section 3)

3) At the time stated in the resolution the legislative body shall hear objections to the abandonment of said purported park. (Section 4)

4) If the objections are overruled the legislative body shall have jurisdiction to order that said purported park be abandoned and

discontinued and the land therein be sold. (Section 5)

B. PARK ABANDONMENT LAW OF 1915. (Stats. 1915, p. 1250, amended by Stats. 1919, p. 237; DERING'S GENERAL LAWS, Act 6375)

Section 1 of the aforementioned Act provided as follows:

> "Whenever a plat or map of a town site has been recorded in the office of the county recorder of any county, purporting to dedicate to the use of the public any tract of land lying within said town site, as a park, and thereafter the territory embraced within said town site has been incorporated into a municipal corporation, and the board of trustees of said municipal corporation find that said tract of land is not appropriate, convenient, or necessary for park purposes, said board of trustees may, with the consent of the original dedicator, abandon and discontinue such park, and may sell and convey the land, and devote the proceeds from the sale thereof to the purchase of other public grounds."

It will be noted that this Act is specifically restricted to the case where there has been a dedication for park purposes by the recordation of a plat or map of a town site and thereafter the territory embraced within said town site has been incorporated in a municipal corporation.

C. PARK DISCONTINUANCE LAW OF 1927. (Stats. 1927, p. 718, amended by Stats. 1929, p. 753, Stats. 1935, p. 1072; DERING'S GENERAL LAWS, Act 6375a.)

This Act provides for the discontinuance and abandonment in the manner therein provided of the use for park purposes of any land the fee of which is or shall be vested in any municipal corporation and which has been dedicated to park use or placed in use as a public park. However, it does not authorize the discontinuance and abandonment of the use of park lands or the change in use thereof which will cause the reversion of such park lands to private ownership or the forfeiture of ownership thereof in fee by the municipal corporation or the discontinuance of the use of park lands acquired in any proceedings wherein a local assessment based on benefits was levied to provide funds for such acquisition. (Section 1)

The procedure for the discontinuance of parks set forth in this statute is the following:

1) The legislative body must adopt a resolution declaring that the public interest or convenience requires the discontinuance and that such legislative body intends to call a special election to submit to the qualified electors the question of the discontinuance of the use of such land as a public park. The resolution shall contain a description of the lands to be discontinued in use as a public park, the name by which the park is commonly known, the disposition which

it is proposed to make of such park, and shall fix the time and place not less than thirty (30) nor more than sixty (60) days after the adoption of such resolution at which the public or persons particularly interested may be heard. (Section 2.)

2) The said resolution shall be published twice in a daily newspaper and notices of the proposed discontinuance of public park land shall be posted conspicuously along the exterior boundaries of the area proposed to be discontinued and abandoned as a public park. The notices shall contain the information required to be set forth in said statute. (Section 3)

3) Within the time set forth, any person or persons interested may make protest in writing against the proposed abandonment or discontinuance of such park use which protests are to be directed to the clerk of the legislative body and which are to be heard and passed upon by such legislative body. In the event that no protests are received or that the legislative body overrules the protest by a 2/3 vote, the legislative body shall have jurisdiction to adopt an ordinance to call a special election for the discontinuance of the use of such park land. (Section 4)

4) If at the special election 2/3 of the qualified electors vote in favor of the discontinuance, the legislative body of the municipal corporation shall have jurisdiction to adopt an ordinance declaring that the use for park purposes shall be discontinued and abandoned. (Section 5)

5) Within ten days after the adoption of such ordinance declaring that the use for park purposes for such land shall be discontinued and abandoned any property owner claiming damage to his property by reason of the discontinuance or abandonment of such park shall file a claim in writing setting forth the nature and amount of such claim. The board shall thereafter appoint appraisers to assess the damages and after the report of the appraisers has been made, a hearing must be had wherein the legislative body shall pass upon the report and may confirm, correct or modify it. Upon the adoption of said report, warrants shall be drawn in favor of the various property owners to whom damages have been allowed, said warrants to be paid out of any fund available for such purpose, or from any funds provided for such purpose by the owner of lands for which such park property may be exchanged. (Section 5a)

6) After such ordinance becomes effective the land therein described shall be deemed to be held by the municipal corporation in fee and may be sold and otherwise disposed of. If the land shall have been acquired for park purposes by the expenditure of moneys derived from the sale of bonds authorized for park purposes, and in the event the land so acquired for park purposes shall be placed in any municipal use, there shall be transferred to such bond fund from such other municipal fund, as shall be determined by the legislative body

of the city, the reasonable value of such land at the time of the ordinance discontinuing the use thereof, and the money so transferred shall be devoted only to the purposes for which such bonds were authorized. (Section 6)

C O N C L U S I O N

As stated above, Charter Section 41.1, which became effective in 1949, permits the sale, abandonment or discontinuance of use of land held for park purposes under the conditions therein set forth. The procedure to be followed is that provided for in the general laws of the State of California. The statutes of the State of California covering the abandonment and discontinuance of park lands has been reviewed above.

The Municipal Park Abandonment Law of 1939, being restricted to lands which have been dedicated for park purposes but which are not appropriate, convenient or necessary for park purposes, have not been used for park purposes, and on which no public funds have been used to improve the same as parks, would appear not to be applicable to Columbia Square. Columbia Square is part of the Pueblo Lands which were never alienated by San Francisco and was dedicated as a plaza. Columbia Square has been used as a park. For that reason its use as a park may not be abandoned and discontinued under the provisions of this law.

The Park Abandonment Law of 1915, as stated above, is restricted to the case where there has been a dedication for park purposes by the recordation of a plat or map of a town site which town site has thereafter been incorporated in a municipal corporation. This statute would also be inapplicable to Columbia Square.

The only statute of the State of California, therefore, under which the use of Columbia Square may be abandoned and discontinued as a park is the Park Discontinuance Law of 1927 which has been reviewed above.

You are therefore advised that if all of the conditions of Section 41.1 of the Charter are complied with Columbia Square may be abandoned and discontinued as a public park under the provisions of Park Discontinuance law of 1927.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Park Commission

LSM

January 30, 1950

SUBJECT: RE: USE OF COLUMBIA SQUARE AS A PARKING AREA; EFFECT OF SECTION 41.1 OF THE CHARTER.

Dear Sir:

This office is in receipt of your request for an opinion wherein you ask to be advised whether the adoption of section 41.1 of the Charter covering the sale, abandonment or discontinuance of the use of land held for park purposes will permit Columbia Square to be used as a parking area at the present time.

O P I N I O N

Section 41.1 of the Charter, adopted in 1949, sets forth the conditions under which park lands no longer needed for park purposes may be sold, abandoned or discontinued, and the procedure for such abandonment or discontinuance. This section provides:

> "Notwithstanding any other provisions of this charter, whenever lands which are or shall be used or intended for use for parks or squares are no longer needed for park or recreational purposes, such lands may be sold or otherwise disposed of, or their use for park purposes may be abandoned or discontinued; provided that nothing herein shall be construed to authorize the discontinuance or abandoment of the use of such lands, or any change in the use thereof which will cause the reversion of such lands to private ownership, or cause the forfeiture of the ownership thereof in fee by the City and County of San Francisco, or as authorizing the discontinuance of the use of park lands acquired in any proceeding wherein a local assessment based on benefits was or shall be levied to provide funds for such acquisition; and provided further that the general laws of the State of California authorizing municipal corporations to abandon or to discontinue the use of land for park purposes, authorizing the sale or other disposition of such lands, and providing procedures therefor and for matters relating thereto, shall be applicable to the City and County of San Francisco and to all lands held or used by it for park purposes and shall govern and control exclusively in respect thereto."

It will be noted from the above section that the conditions for the abandonment or discontinuance of park lands are the following:

1. The lands must no longer be needed for park or recreational purposes.

2. The abandonment or change of use shall not cause the reversion of such lands to private ownership or cause the forfeiture of the ownership thereof in fee by the City and County of San Francisco.

3. The use of park lands must not be discontinued where they were acquired in any proceeding wherein a local assessment based on benefits was levied to provide funds for such acquisition..

4. The general laws of the State of California authorizing municipal corporations to abandon or to discontinue the use of land for park purposes, authorizing the sale or other disposition of such lands, and providing procedures therefor, shall apply to the City and County of San Francisco and to all lands held or used by it for park purposes, and shall govern and control exclusively in respect thereto.

Reference is made to my opinion of June 6, 1949, a copy of which is attached hereto, wherein an analysis was made of the general laws of the State of California governing the abandonment and discontinuance of parks.

In view of the conditions set forth in section 41.1 and the requirements of the general laws of the State of California, Columbia Square may not now be used as a parking area, as the procedure required for the abandonment and discontinuance of Columbia Square as a park has not been complied with.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM

To: Board of Supervisors
Attn: Supervisor George Christopher

cc: Office of the Mayor
Police Commission

No. 121

February 8, 1950

SUBJECT: COLUMBIA SQUARE TRANSFER OF TITLE THERETO BY PARK COMMISSION TO RECREATION COMMISSION; LEASE THEREOF TO PRIVATE INDIVIDUAL OR COMPANY FOR AUTOMOBILE PARKING LOT; NO REVERSION OF TITLE THERETO UPON ABANDONMENT OR DISCONTINUANCE AS A PARK.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"In connection with the abandonment or discontinuance of Columbia Square for park purposes now being considered by the Park Commission, referred to in our letter to you under date of May 23, 1949, and your reply dated June 6, 1949, several questions have arisen which we are unable to answer for ourselves at this time. We would greatly appreciate advice from you on the following questions:

"1. Can the Park Commission legally transfer title to Columbia Suare to the Recreation Commission of the City and County of San Francisco?

"2. Does the condition in Section 41.1 of the Charter that states 'The land must no longer be needed for park or recreational purposes' prohibit the Park Commission from selling the property to private interests in accordance with the Park Abandonment Law of 1927 if the Recreation Commission desires it for recreation purposes under its jurisdiction?

"3. Can the Park Commission legally lease the property to a private individual or company for the purpose of operating automobile parking lot?

"4. As stated in your communication of June 6th, Columbia Square is part of the Pueblo Lands which were never alienated by San Francisco and was dedicated as a plaza. Does that preclude the possibility of title to the land reverting from the Park Department or forfeiture of ownership in fee by the City and County of San Francisco if the use of the land for park purposes is discontinued or abandoned? If ownership should be forfeited to whom would it revert?"

O P I N I O N

IN ANSWER TO QUESTION1:

The Charter of the City and County of San Francisco in effect from 1900 to 1932 permitted the Park Commissioners to set apart parks and squares or portions thereof for recreation centers under the control of the Playground Commissioners. Article XIV-A, Section 9 of the Charter provided as follows:

"The Park Commissioners shall have power to set apart either absolutely or for a definite period of time such parks and squares or portions thereof as they may see proper, other than Golden Gate Park and the Mission Park, for use as children's playgrounds and recreation centers, and the same shall, when so set apart for such use be, to the extent of that use, under the exclusive control and management of the Playground Commissioners."

(See also the Opinion of the City Attorney of February 20, 1914, regarding the transfer of Hamilton Square to the Playground Commission pursuant to the authority of the Charter section above quoted.)

The present Charter of the City and County of San Francisco makes no provision for the transfer of park lands from the Park Department, and therefore at the present time there is no authority for the Park Commission to transfer title to Columbia Square to the Recreation Commission of the City and County of San Francisco.

The Park Commission and the Recreation Commission, however, will be consolidated, effective July 1, 1950, pursuant to amendments to the Charter. If the new commission should desire to operate Columbia Square for recreational purposes after such consolidation, there is no question but that it may do so and Columbia Square will still be legally used for the trust purposes for which it was dedicated.

IN ANSWER TO QUESTION 2:

Section 41.1 of the Charter setting forth the requirements necessary for the abandonment or discontinuance of a park requires that such land be "no longer needed for park or recreational purposes". Section 41 of the Charter provides that "the /park/ commissioners shall have the complete and exclusive control, management and direction of the parks, squares, avenues, grounds and recreation centers, now or hereafter placed under the charge of the commission". The commission is also given power to lease park lands for recreation purposes. The use of the words "recreational purposes" in Section 41.1 of the Charter must be interpreted in the light of the power of the Park Commission in connection with the use of park lands for recreation purposes. If lands under the jurisdiction of the Park Commission are no longer needed for such park or recreation purposes, the use of such lands as parks may be abandoned or discontinued under Section 41.1 of the Charter. The fact that the Recreation Commissioners might desire certain lands of the Park Department for recreation purposes would in no way limit the right to abandon or discontinue the use of lands as a park if such lands are no longer needed for park or recreational purposes under the jurisdiction of the Park Commission.

After the park has been abandoned or discontinued as provided by the Park Discontinuance Law of 1927, the land will still be owned by the City and County of San Francisco and may at any time be placed to any other municipal use, for example, the Recreation Department.

You are therefore advised that the fact that the Recreation Department may desire lands for recreational purposes which the Park Commission desires to abandon or discontinue as a park does not preclude the abandonment or discontinuance of the use of such lands as parks under Section 41.1 of the Charter. After such parks have been abandoned or discontinued as provided by law, the land is deemed to be held by the City in fee and the City may sell or otherwise dispose of the property as it deems proper. (GOVERNMENT CODE, §38460)

IN ANSWER TO QUESTION 3:

Section 41 of the Charter provides in part as follows:

> "The commissioners shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park, square, avenue or ground, except for recreational purposes . . . .
>
> "The commission shall have power to lease any stadium or recreation field under its jurisdiction for athletic contests and exhibitions and may permit the lessee to charge an admission fee."

Columbia Square was dedicated as a park, and the power of the Commission to lease it is restricted as set forth in Section 41. It may be leased for recreation purposes only.

It is obvious therefore that the Park Commission has no authority to lease Columbia Square for the purpose of operating an automobile parking lot, and you are so advised.

IN ANSWER TO QUESTION 4:

As Columbia Square was reserved as a square under the provisions of the Van Ness Ordinance from the pueblo lands of the City of San Francisco, (See MUNICIPAL REPORTS, 1862-3, pages 277-278) the answer to this question requires a brief statement of the history of the pueblo lands in the City and County of San Francisco.

At the end of the war between the United States and Mexico, title to all lands in California was claimed to have vested in the United States. By the Treaty of Guadalupe Hidalgo, the United States agreed to respect the property rights of the inhabitants and to recognize the patents issued by the Spanish and Mexican Governments. It was a settled doctrine of Mexican law that each pueblo owned and was entitled to four square leagues of land upon which it was located. At the time of the conquest the pueblo of which the City of San Francisco became the successor was entitled to four square leagues of land under Mexican law, but it did not have an indefeasible estate in the unconveyed portions of these lands, but only a limited right of disposition and was subject in all particulars to the control of the government of the country. As before the conquest the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the Treaty which followed.

On March 3, 1851, Congress passed "An Act to ascertain and settle private land claims" (U.S. Statutes, Volume 9, page 631), which required that cities, towns, or villages that existed on July 7, 1846, present a claim to the United States for confirmation of land to which they claimed.

On July 2, 1852, a "Petition of the City of San Francisco to the United States Land Commission for claim for the confirmation to it of four leagues of pueblo land" was filed by the City of San Francisco.

On the 21st of December, 1854, the Land Commissioner rendered the decree which confirmed to the City and County of San Francisco three leagues of land as a former pueblo (for decree, see MUNICIPAL REPORTS, 1859-1860, page 172). The City of San Francisco appealed from the decree on the ground that four square leagues had not been confirmed to it. This case remained undecided until 1866.

On June 20, 1855, the Council of the City of San Francisco adopted the Van Ness Ordinance pursuant to which the City reserved to itself all the lots which it then occupied or had only set apart for public squares, streets, schools, etc. (Section 4), and set up a procedure for selecting other lots west of Larkin Street and southwest of Johnston Street for public squares, schools and hospitals (Section 10), and provided that application should be made to the Legislature to confirm and ratify the ordinance, and to Congress to relinquish all the right and title of the United States to the said lands for the uses and purposes specified. (Section 10) (For copies of the Van Ness Ordinance, see MUNICIPAL REPORTS, 1867-1868, page 588, and MUNICIPAL REPORTS, 1886-1887, page 193.)

The Van Ness Ordinance was confirmed by the Legislature of the State of California on March 11, 1858. (See 1858 Statutes of California, Chapter LXVI, page 52.)

On July 1, 1864, Congress enacted "An Act to expedite the settlement of title to lands in the State of California". (13 U.S. Statutes at large, page 332, Chapter CXCIV.) By this Act, Congress relinquished and granted to the City all the interest of the United States within the corporate limits of 1851 in trust for the uses and purposes of the Van Ness Ordinance. Pursuant to said Act, the appeal of the City and County of San Francisco on its petition for the confirmation of four square leagues was transferred to the Circuit Court of the United States, where Justice Field confirmed the claim of the City and County of San Francisco to four square leagues of land as the successor to the former pueblo. (For copy of the Opinion of Justice Field, see MUNICIPAL REPORTS, 1864-1865, page 192, and for a copy of the decree, see 1912-1916 Opinions of the City Attorney, page 116.); CITY OF SAN FRANCISCO v. U.S., Fed Cas No. 12, 316, 4 Sawy. 553.

Thereafter, on March 8, 1866, Congress enacted "An Act to quiet the title to certain lands within the corporate limits of the City and County of San Francisco, and by this Act all the right and title of the United States to the lands covered by the decree of the Circuit Court were relinquished and granted to the City, and the claim to the land was confirmed.

Thereafter, the United States Government issued its patent to the City and County of San Francisco, dated June 20, 1884, which was recorded in the General Land Office, Volume 12, pages 297-340, and in the office of the Recorder of the City and County of San Francisco, on July 1, 1884, in Liber 1 of Patents, page 91. (For a copy of said patent, see MUNICIPAL REPORTS, 1886-1887, Appendix 212, et seq.)

As stated above, the former pueblos did not have an indefeasible title to the four square leagues of land, but the right of disposition and use was, in all particulars, subject to the control of the government of the country.

The State of California, upon its establishment as a sovereign member of the United States succeeded to the right theretofore held by the Mexican Government as to the control and disposition of pueblo lands. See BOARD OF EDUCATION v. MARTIN, 92 Cal. 209, where the court stated:

> "The lands in question were originally held by the pueblo in trust for the public, and subject to the control of the Mexican government. After the cession of California to the United States, the management of this trust was subject, in the first place, to the control of the general government, and became vested in the state of California upon its establishment as a sovereign member of the Union. Upon the organization of the City of San Francisco, its boundaries embraced a portion of these lands, but their title continued to remain impressed with the same trust. The property, as well as the trust upon which it was held, and the corporation to whose management it was intrusted, was municipal, and therefore subject, as all political institutions, trusts, and property, to the direction and control of the superior authority of the sovereign. By the act of March 11, 1858, ratifying and confirming the Van Ness ordinance, it was declared by the state that the lands that had been reserved under that ordinance were reserved for public purposes, and this reservation was afterwards confirmed by Congress by the act of July 1, 1864. These principles have so often been affirmed by the courts of this country that it is only necessary to refer to a few leading cases in which they may be found. (HART v. BURNETT, 15 Cal. 530; PAYNE v. TREADWELL, 16 Cal. 224; SAN FRANCISCO v. CANNAVAN, 42 Cal. 541; TOWNSEND v. GREELEY, 5 Wall. 326; SAN FRANCISCO v. LE ROY, 138 U.S. 656.)"

TOWNSEND v. GREELEY, 72 U.S. 326, 18 L. Ed. 547:

> "By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinance for the settlement and government of her colonies on this continent. These laws and ordinances provided for the assignment

to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of foursquare leagues of land.

"It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth, to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country.

"It is evident from this brief statement that these lands were not assigned to the pueblos in absolute property, but were to be held in trust for the benefit of their inhabitants.

"This is the view taken by the Supreme Court of the State of California, after an extended and elaborate consideration of the subject. HART v. BURNETT, 15 Cal. 530; FULTON v. HANLOW, 20 Cal. 480.

"This view was also taken by the Circuit Court of the United States, in the final decree confirming the claim of the city to her municipal lands. Since the trial of the present cause in the court below, the appeal taken by the city from the decree of the Board of Commissioners has been heard by the Circuit Court of the United States, to which the case was transferred under the Act of July 1st, 1864, Ch. 193, 13 Stat. 333; U. S. V. CIRCUIT JUDGES, 3 Wall., 686 /ante 111/. That decree declares that the confirmation 'is in trust for the benefit of the lot holders, under grants from the pueblo, Town or City of San Francico, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.' From this decree the United States and the City of San Francisco, appeal, the United States from the whole decree, and the city from so much thereof as included certain lands reserved for public purposes in the estimate of the quantity confirmed; but during the present term of this court both parties have, by stipulation, withdrawn their objections, and their respective appeals have been dismissed. It is, therefore, now the settled law that the municipal lands held by the City of San Francisco, as successor to the former pueblo existing there, are not held in absolute property, but in trust for its inhabitants. Trust property, thus held, is not the subject of seizure and sale under judgment and execution against the trustee, whether that trustee be a natural or an artificial person."

Land which had been dedicated to public squares, pursuant to the Van Ness Ordinance could not be conveyed by the City and County of San Francisco, for the lands were held in trust for the benefit of the inhabitants of the State and the City. See HOADLEY v. SAN FRANCISCO, 50 Cal. 265, where the Court states:

"When the squares were dedicated in the mode already stated, they were dedicated to public use; and this use did not vest in the city, nor in the inhabitants of the city, but in the public. It requires, I think, no argument to prove this proposition. In this respect it stands like the streets of a city or the highways in a county. (2 DILLON MUN. CORP., Sec. 520, and cases there cited.) The duty, however, of regulating, improving and protecting the squares, is imposed on the city by the statute providing for the city government. The act of Congress of July 1, 1864, did not destroy, or in any respect impair the dedication; but, on the contrary, by granting and relinquishing the title of the United States to the city, for the uses and purposes mentioned in the act of March 11, 1858, it ratified and confirmed the dedication, and made it operative upon the legal title as well as such title as the city held prior to the act of July 1, 1864, and thus virtually perfected the dedication.

* * * * * * * * *

"The legal title to the squares, as already stated, vested in the city by the operation of the act of Congress of July 1, 1864. Admitting it to be true, that ordinarily the statute of five years is applicable in respect to lands to which the city holds the title, as was decided in this Court in CALDERWOOD v. SAN FRANCISCO (31 Cal. 588), is that statute applicable in this case? Was the legal title which the city held extinguished by the adverse possession of the plaintiff for a period of five years after the passage of the act of Congress of July 1, 1864? The title which the United States held in the land, and which was transferred to the city by the act of Congress, was so transferred to the city in trust, for the purposes expressed in the statute of March 11, 1858, above referred to, and for no other purpose. That is to say, the title was granted to the city in trust, for public use; and the city had no authority, by virtue either of the statute of March 11, 1858, or of the act of Congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and the city having no authority to convey the title, private persons are virtually precluded from acquiring it. The land itself and not the use only, was dedicated to the public. Land held for that purpose, whether held by the State or a municipality, in our opinion, is not subject to the operation of the Statute of Limitations."

See also SAN FRANCISCO v. IRSELL, 80 Cal. 57, where the City had theretofore by ordinance entered into a compromise of a disputed claim whereby it conveyed a part of Hamilton Square to a party named Thompkins. The ordinance was subsequently confirmed by the Legislature. In holding that the ordinance was illegal, the court stated at page 58:.

> "We think that this defense cannot be sustained. The city held the square in trust for the public, and had no power to dispose of it by way of compromise or in any other manner; nor could the legislature ratify such a disposition of the trust property. In HOADLEY v. SAN FRANCISCO, 50 Cal. 275, the court said with reference to this same square: 'The title was granted to the city in trust for public use, and the city had no authority by virtue either of the statute of March 11, 1858, or of the act of Congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and the city having no authority to convey the title, private persons are virtually precluded from acquiring it' This case was approved and following in SAWYER v. SAN FRANCISCO, 50 Cal. 375, and in HOADLEY v. SAN FRANCISCO, 70 Cal. 324, which was affirmed by the supreme court of the United States upon writ of error. (124 U.S. 646.) The rule, therefore, that the city holds property like this in trust, and cannot convey it, must be considered as settled."

See also LA SOCIETA ITALIANA DI MUTUAL BENEFICIENZA v. CITY AND COUNTY OF SAN FRANCISCO, 131 Cal. 169, where the court held that the City did not have the power to grant cemetery lands held in trust by it for a public use to a private corporation. However, as stated in our Opinion of June 6, 1949, the Park Discontinuance Law of 1927, recently codified in the Government Code, requires that a special election be held at which time there will be submitted to the qualified voters of the municipal corporation the question as to whether lands which have been dedicated for park purposes may be abandoned and discontinued as a park. (GOVERNMENT CODE, §38450) The purpose of the election is to allow the persons for whose benefit the park has been dedicated to decide whether the trust purpose for which the municipality holds the land may be abandoned and discontinued. If the electors approve the abandonment by a two-thirds vote, the land would no longer be held in trust and the City would be able to dispose of the lands as provided in the Park Discontinuance Law of 1927. (GOVERNMENT CODE, §38451)

I am of the opinion that upon the abandonment or discontinuance of a park which had formerly been part of the pueblo lands of the City and County of San Francisco there would be no reversion of the title from the City and County of San Francisco or no forfeiture of ownership in fee by the City and County of San Francisco.

CONCLUSION

When the United States took over what is now California, the City of San Francisco succeeded to the pueblo lands of the former pueblo and the United States was by the Treaty of Guadalupe Hidalgo obligated to protect all rights of property emanating from the Mexican Government previous to that Treaty. These included the rights of private individuals and the rights of former pueblos. As far as the City of San Francisco is concerned, this obligation was fulfilled by the decisions of the United States courts and by the acts of Congress confirming the four square leagues of land to San Francisco to which it was entitled as the successor of the former pueblo. The power formerly lodged in the Mexican Government regarding the management, control or disposition of these pueblo lands became vested in the State of California, and has there since remained except in such cases as that body has in turn delegated it to the municipal authorities. This has been done by the approval of the Van Ness Ordinance under which the City of San Francisco disposed of the pueblo lands to the persons who occupied such lands as of a certain date and reserved unto itself other portions for public municipal purposes. The land reserved by the City and County of San Francisco is held in fee by the City and County of San Francisco for the particular trust purpose. The State of California has set up the procedure whereby the trust in park lands so held may be abandoned and discontinued.

You are therefore advised that upon the abandoment and discontinuance of Columbia Square as a park, pursuant to the provisions of the Park Discontinuance Law of 1927, there will be no reversion of title from the City and County of San Francisco or forfeiture of the fee thereof by the City and County of San Francisco.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM

To: The Park Commission

cc: Recreation Commission

No. 144

March 27, 1950

SUBJECT: COLUMBIA SQUARE; USE THEREOF BY FIRE DEPARTMENT FOR DRILL TOWER.

Dear Sir:

This office is in receipt of your request for an opinion as to whether Columbia Square may be transferred to the Fire Department for the use as a drill tower, in view of the fact that the present drill tower of the Fire Department must be abandoned because of the construction of the Bayshore Freeway.

O P I N I O N

Columbia Square, referred to in your request, is a portion of the pueblo lands reserved by the City and County of San Francisco, pursuant to the Van Ness Ordinance, for park purposes.

On June 6, 1949, I rendered an opinion to the Park Commission regarding the abandonment of Columbia Square, pursuant to Section 41.1 of the Charter. As pointed out in that opinion, the procedure for the abandonment of parks under Section 41.1 is that set forth in the General Laws of the State of California. The Park Discontinuance Law of 1927, referred to in the opinion of June 6, 1949, was codified at the recent session of the Legislature and is now located in the Government Code, §38440 to §38462. As pointed out, the abandonment of a park under that act would require the submission of the question of discontinuance and abandonment of the park to the electors and the approval thereof by a two-third's vote. (GOVERNMENT CODE, §38450 and §38451.) After the approval by the electors, the land would be held by the City in fee and might be disposed of by the City as it deemed proper. (GOVERNMENT CODE, §38460.) If the electors were to approve the abandonment of Columbia Square, the land thereof could thereafter be used by the City for any purpose.

You are therefore advised that should it be the desire to make Columbia Square available to the Fire Department for the purposes outlined above, this may be done by following the procedure set forth in Section 41.1 for the abandonment of Columbia Square as a park, after which the land can be transferred to the Fire Department.

Respectfully submitted,

DION R. HOLM
City Attorney

LSM
To: Mayor Elmer E. Robinson.
cc Chief Edward P. Walsh,
Fire Department.
Park Commission.
Recreation Commission.

Opinion No. 251

September 14, 1950

SUBJECT: RIGHT OF CALIFORNIA STREET CABLE RAILROAD COMPANY TO OPERATE BUSES DURING CONSTRUCTION OF BROADWAY TUNNEL

Dear Sir:

We are in receipt of your request, on behalf of the Judiciary Committee, for an opinion, reading as follows:

> "The Judiciary Committee understands that the California Street Cable Railroad Company is operating buses rather than cable cars over a portion of its lines during certain hours.
>
> "As one phase of its considerations with respect to the Charter provisions for acquisition of the operating properties of said company, the Committee desires to be informed with respect to the authority of the company to substitute bus service for cable car service. The Committee will appreciate your advices in this connection."

O P I N I O N

In response to your above stated request for an opinion, it will be in order first to set forth the following facts:

Commencing with June 14, 1876, and extending through the year 1896, the predecessors of California Street Cable Railroad Company were granted various franchises along the routes now, in broad terms, recognized as the California Street Line and the Hyde Street Line, to which California Street Cable Railroad Company succeeded.

We have taken occasion to examine the details of these franchises. Descriptive of the service by cars, the following, under the franchise of June 14, 1876, with Senator Stanford and his associates as grantees, is typical of the various franchises:

> "They shall be moved by means of endless ropes attached to stationary steam engines."

This, apparently, was intended to designate that which is at this day known as a cable car line.

It no doubt would be unduly burdensome to recite the details of the various franchises and the renewals thereof, containing the same general provisions. However, for the purpose of the record, it is in order to state that the franchises and renewals thereof were embodied in the following numbered orders of the Board of Supervisors from 1876 to 1896: Order Nos. 1292, 1489, 1537, 1538, 2015, 2058, and 2175.

After careful check, we find that these orders cover franchises providing for operation of the above described equipment upon the present routes of the California Street Cable Railroad Company.

Under Sections 6(a) and 6(b), constituting amendments in 1930 to the 1900 Charter of the City and County of San Francisco, the California Street Cable Railroad Company, as successor of the holders of these various franchises, filed a declaration of surrender with the Board of Supervisors, under date of March 23, 1931. (Section 134 of the present Charter, coming into effect January 8, 1932, contains substantially the same provisions). In substance, those sections provided that, upon the filing of such declaration, an operating permit is in effect granted for a period of 25 years, upon the same terms and conditions as embodied in the franchises theretofore issued.

A check by this office reveals that, at the time of the issuance of such operating permit, the franchises heretofore referred to, including the renewals thereof, had expired by lapse of time. However, we are of the opinion that the City is not in a position to dispute the efficacy of the operating permit. The consequence is that the California Street Cable Railroad Company is in ownership of an operating permit, comprehending the terms and conditions set forth in the various franchises, with the operating permit extending to the 22nd day of March, 1956.

Under date of August 9, 1950, Thomas A. Brooks, Chief Administrative Officer of the City and County of San Francisco, sent a communication to the California Street Cable Railroad Company, authorizing the grant of a permit by the Department of Public Works to that company for a bus service along a designated route in substitution of cable car service being afforded along Hyde Street from California Street to the foot of Hyde Street. Mr. Brooks was at pains to point out that such permit was to be effective only for the period necessitated by construction work at the west portal of the Broadway Tunnel.

Such permit was thereafter issued by the Department of Public Works.

Prior to the issuance of such permit, and on June 29, 1950, California Street Cable Railroad Company instituted an action against the City for injunctive and declaratory relief. The object of the suit was to restrain the City from interfering with the operation of the cable car line at Broadway and Hyde Street for any period beyond four days.

The record in that suit established that in the construction of the Broadway Tunnel an open cut was to be made and to continue in existence across Hyde Street and vicinity, with the westerly portal of the tunnel itself located some feet easterly from Hyde Street. The plan is to continue Hyde Street in the form of a bridge across this cut.

That record further established the following facts: Two possible plans for the continuance of cable car service across the cut were suggested by the Department of Public Works by communications to the California Street Cable Railroad Company, of which the Court was advised. One plan was for the construction of a temporary bridge (at the expense of the company, as the law requires). The other plan was for abandonment of cable car service at that point, enabling more convenient construction of the permanent bridge, during a period of six months. For convenience, these will be referred to, respectively, as "the four day plan" and "the six months plan."

Through a showing by the City, the Court was advised that the four day plan would cost approximately the sum of $32,500. The six months plan would, of course, cost substantially less. The preliminary injunction sought in that case was to commit the City to the so-called four day plan, although the plaintiff made no offer to comply with its legal obligation to pay for such expense.

The Superior Court denied a preliminary injunction, sustained the City's demurrer without leave to amend, and ordered dismissal of the action.

Thereafter, the company made application for leave to operate buses, apparently reconciled to the six months plan. Shortly after the grant of the permit, excavation work at Broadway and Hyde Street, incidentally eliminating the cable car tracks, was initiated.

The terms "operating permit" and "franchise" will hereinafter be used interchangeably. For all practical purposes, the so-called "operating permit" is itself a franchise.

We are of the view that the method of temporary operation through buses, caused by the work performed for the City in the

construction of the Broadway Tunnel is not a violation of the operating permit. This problem is not a new one, so far as the courts are concerned. Various cases have held that the substitution of one character of service, more modern in type, for another less modern, is not a violation of a franchise, although the words of the franchise might seemingly be restricted to the prior, or more obsolete, form of transportation.

Leroy v. Worcester St. Ry. Co.
(Mass. 1934), 191 N. E. 39,

is an example of the decisions we have mentioned. In that case, it was contended that the street railway company violated its franchise in the substitution of motor buses, since its franchise mentioned street railway cars only. The Court held that there was no violation of franchise, saying (p. 44 of 191 N. E., middle of column 1):

> "Although originally railroad vehicles were confined to one fixed path of travel, the ability of motorbuses to traverse any suitable part of a street or location does not necessarily indicate a departure from the purposes of a railroad franchise. Even though the statutory charters refer in terms to railroads which of necessity confine the vehicle to one definite course, the essential purpose was to establish companies which would in a convenient manner transport members of the public."

On a similar issue, the Court said in

Warren v. Fitzgerald (Md. 1948),
56 Atl. (2d) 827, 831
(bottom of column 2):

> "Transportation is the end, rails and motive power are means. When new motive power makes rails unnecessary, power to furnish transportation is not lost."

It was likewise held in

Scott v. Cincinnati N. & C. Ry. Co.
(Ky. 1937), 105 S. W. (2d) 169,

that there was no abandonment of a franchise where buses were substituted for street cars. The Court there said (p. 172, top of column 2):

> "There is another argument made in briefs (but which is not classified in the pleadings)

to the effect that the city had no right to consent to the use of busses upon its streets for transportation of passengers in lieu of or as an aid to the same service performed by street cars running on fixed tracks. But we have heretofore decided that question adversely to the contention of counsel in a great number of cases. Such a change in motive power and transportation vehicles is permitted in order to meet changed and altered conditions, since, in doing so, the service contracted for in granting the franchise is not interfered with by the change, but is continued to be carried out and performed, in a manner to meet new conditions, and at the same time to not be in the least detrimental to the safety and convenience of the traveling public. On the contrary, the changes from the old street railway method of transportation to that furnished by busses are plainly in furtherance of a more convenient and safer method of traveling and also with the removal of many objectionable features incident to street railway transportation."

Carolina Power & Light Co. v. Iseley (N. C. 1933), 167 S. E. 56, 62 (bottom of column 1):

"'The purpose and object of the franchise involved in this case was to provide for the rapid and convenient transportation of the public. That was the basic right granted. The motive power or method of propulsion of the vehicle is subordinate or subsidiary. It is but the means of making the franchise effective. Is the substitution of cars running on rubber tires, free from limitations of steel rails and trolley wires, and propelled by internal combustion engines, in place of cars with metal wheels without tires on fixed rails, and propelled by electric motors supplied with power through overhead wires, such a radical departure from the purposes and objects and terms of the original franchise as to preclude the change? If busses be used for the transportation of passengers, there is no additional servitude on the streets or obstructions to the free and safe use of the streets by other vehicles. On the contrary, the streets are relieved of trolley poles and wires and the imbedded rails, more or less dangerous. It can hardly be said that the operation of the busses is

more dangerous or obstructive than the operation of electric street cars on the thoroughfares. The problem is one of distinction between the essence in which the permanent value lies--the use of streets for transportation of passengers for hire--and the incidents of that franchisal right which are subject to change by agreement, viz. the facilities to be used.'"

In

City of Columbia v. Pearman
(S. C.1936), 185 S. E. 747,

the City took the position that the Public Service Commission of the State had no power to permit the substitution of buses for street cars under the terms of the company's franchise. In ruling adversely upon this contention, the Court stated (page 750, bottom of column 2):

"The power company will be performing exactly the same kind of service with busses that it now performs partly with busses and partly with street cars. It will carry the same people to the same points. It will run over the same routes, except as changed by the commission. The only difference is that it will employ improved instrumentalities of transportation. It will continue to be the same company performing the same public service, under the same charter, and in discharge of the same obligation declared by the Supreme Court in the Street Car Case. To hold that a change in the instrumentalities of transportation would defeat the jurisdiction of the commission under sections 8252-8255 would be highly technical and entirely unnecessary."

Cincinnati N. & C. Ry. Co. v.
City of Bellevue (1941),
151 S. W. (2d) 1025,

is of interest. This was an action by the municipality against the railway company to enjoin the railway company from operating buses and to compel the reinstatement of an electric street car service under a franchise which covered, in terms, an electric street car service only. In that instance, the terms of the franchise were that buses could be operated when necessary to "supplement" the service. The Court held that the whole system within a municipality could be "supplemented" by the installation of bus service

in place of street cars. The Court said (p. 1026, middle of column 2):

> "The history of the Company's operations from horse-drawn cars to electric streetcars, to trolley buses and motor coaches, parallels the development of municipal transportation systems. The increased use of the automobile and the necessity for the speeding up of traffic in metropolitan areas has demanded a system of transportation more flexible than that furnished by electric streetcars operated upon rails. Certainly, this was generally known in 1936. It is reasonable to assume that the officials of the Company knew at that time that, if they were to stay in the transportation business and render reasonably adequate service for their customers, they would be called upon to abandon their obsolete equipment. As indicated, we think the part of section 4 of the 1936 franchise heretofore quoted lends itself to the interpretation that within the period of its life (seven years), the transportation system would have to be improved and supplemented by the substitution of trolley or motor coaches for electric streetcars. We think section 4 of the franchise authorized such a substitution, to say nothing of the authorization granted to the Company by the Public Service Commission."

In accord with the foregoing authorities, is

> Russell v. Kentucky Utilities Co.
> (Ky. 1929), 22 S. W. (2d) 289,
> 66 A. L. R. 1238 (Annotation at p. 1245).

It is of interest to note that in an opinion under date of December 30, 1940, the City Attorney ruled that the substitution by the Market Street Railway Company of buses for street cars on one of its routes was not in violation of the operating permit theretofore issued to it under the 1930 amendments incorporating Sections 6(a) and 6(b) into the Charter of 1900. The reasoning and conclusion of that opinion is in accord with what is here determined. With the exception of the last decision, the various cases hereinabove cited are in addition to the cases considered in that opinion.

It will be noted that the cases heretofore cited involve instances where there were permanent changes in modes of service. The prior opinion of the City Attorney, to which reference has been made, concerned not only the substitution of bus service but also removal of tracks.

Since we are of the view that the foregoing cases present sound law, it follows a fortiori that the temporary substitution of cable cars for buses is not in violation of the operating permit issued to California Street Cable Railroad Company.

This opinion is, of course, not to be interpreted as extending beyond the utilization of buses in this temporary period of construction of the Broadway Tunnel, the open cut and the bridge and appurtenances.

Respectfully submitted,

DION R. HOLM
City Attorney

ADT

To: Mr. John R. McGrath, Clerk
Board of Supervisors.

No. 252

Sept. 20, 1950

SUBJECT: WAGE SURVEY--COOPERATION WITH BUREAU OF LABOR STATISTICS BY CIVIL SERVICE COMMISSION--SALARY STANDARDIZATION.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"Pursuant to the provisions of section 151 of the charter we have been directed by the Board of Supervisors to submit to the Board proposed salary standardization schedules on or before February 7, 1950.

"Heretofore wage data has been collected from some 200 private firms in San Francisco on a pledge of official confidence of the source of the data, and from 8 or 9 public jurisdictions throughout the State.

"In the 1949-50 wage survey all but 71 of these firms withdrew the data when the Superior Court, in litigation arising out of a suit of relatively few employees, issued an Order of Inspection requiring the Commission to disclose the source of the wage data. As a result, the 1949-50 wage survey was necessarily confined to data from public employment in California. The validity of this Superior Court Order of Inspection is still under review by the higher courts. Therefore the Commission is unable at this time to solicit and receive wage data from private employers under a pledge of official confidence as to the source of the data.

"When the petition for a Writ of Prohibition against the Superior Court Order of Inspection was filed in the Appellate Court, several of the private employers who had submitted and subsequently withdrew data, filed briefs on behalf of the city's position, in which these private employers stated, in substance, that such data would not have been made available to the Commission in the past, nor would such data be made available in the future, if specific wage data and wage policies of the respective firms was subject to public inspection.

"The approximate 200 firms which have heretofore cooperated in wage surveys are the most representative and the largest firms in the various categories or types of industry in San Francisco. They employ some 25,000 employees. Data from these approximate 200 firms represents a comprehensive sampling of rates of pay of private employment in the community. If data from most of these 200 firms are not available, we would have to obtain data from approximately 600 other firms in order to cover the same number of employments. Even if it were physically possible to collect and process wage data from this number of firms in the short space of time that a survey must be conducted and completed, and assuming that 600 private employers would cooperate by supplying wage data under the present conditions, such data would probably not represent a comprehensive sampling of rates in private employment according to types of industry.

"In our dilemma we have contacted representatives of civic and business organizations to solicit their cooperation in pursuading the firms which have cooperated in the past under pledges of official confidence, to again supply information even though we are not now able to give such pledges of confidence. The representatives of these organizations expressed their full understanding of the city's problem and agreed that the cooperation of the private employers is necessary if municipal salary schedules are to be kept in line with those prevailing locally in private employment. However they pointed out that private employers in highly competitive fields may well refuse to disclose such confidential information as rates of pay concerning specific employments and details of wage administration policies if the information is subject to public inspection. I am sure that we can expect a sympathetic consideration of our problems and our needs, by the civic and business organizations as well as the business community, but we have, as yet, received no assurance that the private firms will cooperate in the pending survey. In the meantime the extent and scope of the survey must be determined and plans must be completed. We believe that the inclusion of wage data from private employments in the present survey is essential to assure fair and equitable salaries for municipal employments under section 151 of the charter.

"Accordingly, we have discussed with the Bureau of Labor Statistics, U. S. Department of Labor, the possibility of joining with the Bureau in a joint wage survey. Tentative proposals have been submitted by the Bureau under which the Bureau, with its own staff, will collect from private employment the necessary wage data and deliver to the Civil

Service Commission in such form that the source of the specific data is not identified by the name of the firm. As you are aware, the Bureau of Labor Statistics is prohibited by regulation adopted pursuant to laws created by Congress, from disclosing the source of specific data, and therefore the Bureau is able to collect data from private employment which may hereafter be refused to the Civil Service Commission. Provision is made in the tentative proposal by the Bureau for full participation by the City in the conduct of the survey through the review and approval by the Commission of all phases of the survey. The Commission would reimburse the Bureau for such services. If these arrangements can be made under our charter, the terms and conditions of the joint undertaking would be set forth in a contract between the Bureau and the Purchaser of Supplies. You will recall that on two former occasions the City contracted with private contractors to conduct salary surveys under the Commission's general supervision.

"We have reviewed the provisions of Section 151 of the charter and find nothing therein which would prohibit us from joining with the Bureau in a joint wage survey of wages in private employment as proposed by the Bureau.

"We request that you advise us if in your opinion we may make such arrangements with the Bureau of Labor Statistics as tentatively outlined in the attached communication."

O P I N I O N

From your request it would appear that a sincere effort has been made by the Civil Service Commission to obtain the renewed cooperation of the some 200 private firms who have previously submitted their data in connection with wage surveys made by the City and County of San Francisco. I gather that in view of the pending litigation, to which you have referred, you were unable to receive any greater cooperation than the limited number of firms who had indicated a willingness to participate in the 1949-50 wage survey--but which firms were insufficient in number or scope of coverage to constitute a comprehensive survey of wages paid in private employment, as called for under provisions of Section 151 of the charter.

I particularly note your assertion that the commission believes that the inclusion of wage data from private employers in the present survey is essential to assure fair and equitable salaries for municipal employments under section 151; and your

further assertion and conclusion that, as matters presently stand unless the commission can consummate an arrangement with an outside agency, such as the Bureau of Labor Statistics, United States Department of Labor, to collect the requisite wage data from private employments for the Civil Service Commission, it probably will be impossible to include wage data from private employments in the present wage survey to be conducted.

I also note your statement that on two former occasions, the City contracted for private contractors to collect wage data from private employers for the Civil Service Commission.

I also note in passing the statement that appears in the letter from the U. S. Department of Labor, on the Bureau of Labor Statistics, dated August 28, 1950, a copy of which was attached to the request for an opinion, wherein the writer thereof stated as follows:

> "The above briefly outlines our thinking on how a cooperative arrangement between the City and the Bureau might work out. Such an arrangement was successful in a joint program undertaken by the Bay Area Salary Survey Committee and the Bureau early this year. A similar joint program is foreseen with this group for early 1951 with resultant economies for all participants. As you know, the Bay Area Salary Survey Committee is composed of several East Bay governmental jurisdictions and the State Personnel Board.
>
> "With the San Francisco Civil Service Commission pooling resources with us for a joint undertaking this fall, a new high mark will have been reached in the elimination of duplicating activities of municipal, state and federal governmental agencies."

Section 151 of the charter, in so far as is here pertinent, provides as follows:

> "... In fixing schedules of compensation as in this section provided, the civil service commission shall prepare and submit to the board of supervisors and the board shall adopt a schedule of compensations which shall include all classifications, positions and places of employment the wages or salaries for which are subject to the provisions of this section; ...
>
> "The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey

concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state. The commission shall set forth in the official records of its proceedings all of the data thus obtained and on the basis of such data the commission shall set forth in its official records an order making its findings as to what is the generally prevailing rate of pay for each class of employment in the municipal service as herein provided, and shall recommend a rate of pay for each such classification in accordance therewith ....."

It will be particularly noted that section 151 of the charter nowhere requires that the Civil Service Commission itself collect the data from private employers. As a matter of fact your very request itself indicates that on two former occasions the City contracted with private contractors to collect the data for the Civil Service Commission. All that the charter requires is that the Civil Service Commission "on the basis of facts and data obtained" (whether collected by the Civil Service Commission itself or some other reliable responsible agency) prepare and submit to the Board of Supervisors, with the recommendation of the Civil Service Commission, a proposed schedule of compensations for all classifications, positions and places of employment, the wages or salaries for which are subject to the provisions of Section 151 of the charter.

I believe it would be most desirable for the Civil Service Commission to collect the wage data itself, if that be possible. However, under the provisions of Section 151 of the Charter, the Civil Service Commission is not specifically required to collect the wage data itself, and in view of the unusual circumstances presently existing (i.e. the data pertaining to wages paid in private employments will not be made available to the Civil Service Commission to enable it to make a comprehensive survey), I can see no reason which would prohibit an arrangement being made with the Bureau of Labor Statistics, United States Department of Labor, to allow it to collect the required wage data of wages paid in private employment for the Civil Service Commission. It will be understood, of course, that the Civil Service Commission will have

and exercise exclusive authority to appraise, evaluate and interpret the data so collected and to formulate the proposed wage schedules to be recommended to the Board of Supervisors.

You are thus advised in connection with your inquiry as submitted.

Respectfully submitted,

DION R. HOLM
City Attorney

NSW

To: Civil Service Commission
Attn: Mr. William L. Henderson

Opinion No. 253
September 25, 1950

SUBJECT: WAR MEMORIAL - CLOSING OF OFFICE ON SATURDAY.

Dear Sir:

We have your request for an opinion as follows:

"The War Memorial Board of Trustees have in mind placing a five (5) day work period in operation for the office employees.

"Is it possible under Section 220 of the City Charter and Section 1.7 of the 1949-50 Salary Standardization Ordinance to completely close the office of the War Memorial Department on Saturday mornings."

O P I N I O N

In Section 10 of the Political Code of the State of California the following is found:

"Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances or charters provide that public offices shall be closed on holidays."

In this City, Section 220 of the Charter provides as follows:

"Except where otherwise provided by law, all public offices shall be open for business every day, except legal holidays from eighty-thirty o'clock A.M. until five o'clock P.M."

There is no law or ordinance to be found which excludes the office of the War Memorial trustees from the provisions of Section 220 of the Charter.

At the outset then it must be determined whether the office of the War Memorial trustees is a public office.

The first approach to a solution of this problem is to determine whether the War Memorial Building is a public building. In 12 CORPUS JURIS. (2d) at page 385, a public building is defined as a building erected and owned by state, county or municipal authorities; a building belonging to, or used by, the public for the transaction of public or quasi-public business.

The matter of ownership and control are determining factors in the definition of a public building. Therefore, we turn to Section 44 of the Charter dealing with the War Memorial and find the following:

> "The Board of Trustees of the San Francisco War Memorial shall, under ordinance, have charge of the construction, administration and operation of said War Memorial and the ground set aside therefor.
>
> * * * *
>
> "The Board of Supervisors shall annually appropriate to the War Memorial Board an amount sufficient to defray the cost of maintenance, operating and caring for said War Memorial."

From that section it not only appears that officers of the city and county manage and control the War Memorial, but in addition to that, the cost of maintenance and operation is paid for with public funds.

The problem may also be approached from the viewpoint of whether the members of the Board of War Memorial Trustees are public officers. In this connection, we turn to Section 4 of the Charter and find that "the officers of the city and county shall be * * * members of boards and commissions appointed by the mayor * * *." Section 44 of the Charter then provides that "the board shall consist of eleven members appointed by the mayor, subject to confirmation by the board of supervisors."

From the foregoing, it is my opinion that the War Memorial is a public building and it, as well as the office of the War Memorial Building, is under the supervision, maintenance and control of public officers, namely, the members of the Board of Trustees of the War Memorial, and that the business conducted in the office of the War Memorial is public business.

Such being my opinion, the office of the War Memorial must remain open on Saturday mornings and arrangements must be made under Section 1.7 of the annual salary ordinance (1950-51) to have employees on duty on Saturday mornings in the office of the War Memorial.

Respectfully submitted,

DION R. HOLM,
City Attorney.

CWD

To: Managing Director,
War Memorial of San Francisco.

OPINION NO. 254

September 25, 1950

SUBJECT: SUICIDE ATTEMPTS - RIGHTS OF AMBULANCE CREW

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"The removal of patients who attempt suicide presents a constantly recurring problem for hospital personnel and police alike.

"May I ask that you render an opinion on the following specific questions:

"A patient attempts suicide, is conscious when the ambulance crew arrives, and refuses to leave the premises or go to a hospital . . .

"1. Does the ambulance crew, or police, have the right to force this patient to go to the hospital?

"2. Can the doctor on duty force treatment on the patient to save his or her life?

"3. Has a wife, or husband, the right to demand the removal of the spouse, even if the spouse refuses to go?

"4. If the patient refuses to accompany the ambulance crew, can the police force the patient to do so?

"5. If the patient refuses to accompany the ambulance crew, and then dies as a result of the attempt, can the ambulance crew be held responsible for <u>any</u> reason?"

OPINION

The privacy or private rights of an individual may be encroached upon or regulated by virtue of the police power of the governing body. The exercise of this power necessarily interferes in some respects with the liberty of the citizen, as his right to move about as he pleases, or his right to follow in his own way any lawful occupation, or his right in the use of his property. This interference is justified solely on the ground that it is required in order to protect the personal and property rights of others, and advance the best interests of society. Therefore, in the event that an individual who is in possession of his faculties attempts to destroy himself and his acts in no way interfere with the personal and property rights of others or with the best interests of society, he cannot be forced to go to a hospital or receive medical treatment under the guise of the police power of the governing body. However, if the attempt at suicide is conducted in a public place or any place where the acts involved in the attempt may be construed as a nuisance, disorderly conduct, intoxication, or disturbing the peace, etc., then the individual may be removed on the grounds of committing a public offense. 3 McQUILLIN, MUNICIPAL CORPS. (Revised), Sections 936, 945, 946 and 960; PENAL CODE, Section 415.

Attempted suicide is not a crime in California. Only those who aid or encourage another to commit suicide may be charged with a felony. (PENAL CODE, Section 401)

In view of the foregoing principles, the answers to your proposed questions are as follows:

1. When a person who has attempted suicide, is found in his private dwelling conscious, sober and competent, he cannot be forced, either by the ambulance crew or the police, to go to the hospital against his will. If his acts constitute a public offense referred to above, he may be arrested by the police.

2. A doctor may not treat a conscious, sober and competent patient, even to save his or her life without the express consent of the patient. In such a case, if the doctor proceeds against the will of the patient, he may be charged with assault and battery. Consent may be given by one legally authorized to give it, for example, parent and minor child, guardian and ward, or the head of an institution for incompetents. In some cases doctors proceed

under the implied consent theory when the patient is conscious and does not object or where the patient is unconscious and cannot give his consent. 76 A. L. R. 562; 41 AM. JUR. 220, MARKART v. ZEIMER, 67 Cal. App. 363.

3. A married person who has attempted suicide and is conscious, sober and competent cannot be forced to go to the hospital on the demand of his or her spouse. 4 A. L. R. 1531.

4. A conscious, sober and competent person may not be forced by the police to accompany an ambulance crew. The police may make an arrest if a public offense is committed.

5. In the event the type of patient I have been referring to, who refused treatment dies as a result of the attempt, neither the city nor the ambulance crew may be held responsible.

The private rights of an individual who is conscious, sober and competent cannot be regulated unless his acts affect the rights of others or adversely affect the best interest of the public. Such an individual may refuse medical treatment and cannot be forced into a hospital unless his condition is such that he must be quarantined to prevent the spread of disease. (HEALTH AND SAFETY CODE, Sections 2522 and 2524)

Respectfully submitted,

DION R. HOLM
City Attorney

CWD

To: Dr. J. C. Geiger
Director of Public Health

Thru: Mr. Thomas A. Brooks
Chief Administrative Officer

Opinion No. 255
September 25, 1950

SUBJECT: CONTRACTOR'S LICENSE - CLASSIFICATION - GENERAL BUILDING LICENSE OF CONTRACTOR BIDDING ON JOB REQUIRING GENERAL ENGINEERING CLASSIFICATION LICENSE.

Dear Sir:

You have requested an opinion as follows:

"Bids were received on September 13, 1950 for the construction of a sewer in Phelan Avenue. The low bid was $27,744 submitted by Walter Lenkeit, who listed his State Contractor's License Number as 67272. A check shows this to be in Classification B-1, General Building Contractor. Work of the character bid upon in this instance, such as sewers, is shown as in Classification A, General Engineering Contractor.

"The question arising therefore, is whether or not we are bound by the State Business and Professions Code to the extent that we are compelled to reject the bid of Mr. Lenkeit in this instance for the reason that his State License does not qualify him to perform the work upon which he bid; namely, the construction of the Phelan Avenue Sewer and Appurtenances."

O P I N I O N

Section 7055, Business and Professions Code, provides:

"§7055. BRANCHES OF CONTRACTING BUSINESS. For the purpose of classification, the contracting business includes any or all of the following branches:

"(a) General engineering contracting.
"(b) General building contracting.
"(c) Specialty contracting."

Section 7056, Business and Professions Code, provides:

"§7056. GENERAL ENGINEERING CONTRACTOR. A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works for any or all of the following divisions or subjects: Irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, railroads, highways, tunnels, airports and airways, sewage and bridges."

Section 7057, Business and Professions Code, hereinafter cited, and the further sections of this Code, provide:

"§7057. GENERAL BUILDING CONTRACTOR. A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

"This does not include anyone who merely furnishes materials or supplies under Section 7045 without fabricating them into, or consuming them in the performance of the work of the general building contractor."

"§7058. SPECIALTY CONTRACTOR. A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts."

"§7059. CLASSIFICATION OF CONTRACTORS.

"/Adoption of rules: Limitation of field of licensed contractor: Additional classifications: Fee./ The registrar with the approval of the board, may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage, as defined by Sections 7055, 7056, 7057, and 7058. A licensee may make application for classification and be classified in more than one classification if the licensee meets the qualifications prescribed by the board for such additional classification or classifications. No additional application or license fee shall be charged for qualifying or classifying a licensee in additional classifications.

"/Contracts involving two or more crafts./ Nothing contained in this section shall prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he is licensed, is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed."

"§7028. ENGAGING IN BUSINESS WITHOUT LICENSE. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter."

"§7031. ALLEGATION AND PROOF OF LICENSE IN ACTION ON CONTRACT. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

Rules and Regulations, Contractors' State License Board, Title 16, Chapter 8, Art. 3, section 730,/and other referred to sections, in part provide: Administrative Code

" . . . licensees licensed in one classification shall generally be prohibited from contracting in the field of any classification outside of the classification in which they are licensed . . ."

§732 deals with specialty licenses.

§755 provides:

"A licensee may be licensed in more than one classification. The classification in which his principal business falls and which is assigned to him by the registrar as his main or principal classification shall be known as his 'primary' classification. Any other classification or classifications in which he is classified and licensed shall be known as his 'supplemental' classification or classifications."

Section 756 provides for an assignment to an applicant of a "primary classification"; any supplemental classifications for which the licensee has qualified and licensed "shall be designated upon the permanent license certificate, . . .".

Section 760 reads:

"Limitation of Classification. A licensee classified as a general engineering contractor, shall operate only within the scope as defined in Section 7056 of Chapter 9 of Division 3 of the Business and Professions Code.

"A licensee classified as a general building contractor, as defined in Section 7057, shall not take a prime contract

unless the same requires more than two unrelated building trades or crafts, or unless he has qualified for the particular specialty classification or classifications as established by the Board. . . . Nothing in this rule shall be construed to extend the field and scope of the operations of a licensed contractor to those in which he is not classified and qualified to engage as defined in Sections 7055, 7056, 7057 and 7058 . . .".

Section 7059, Business and Professions Code, is reviewed in 3 Atty Gen Ops p. 311 (1944) and holds that classification by the legislature is proper. The opinion states:

"If a person is licensed and classified as a general contractor, he can take a contract for construction business for any type of construction work or contract. . . . Being qualified to engage in the whole, he is necessarily qualified to engage in any part thereof."

And

"Although a license to engage in a particular business is in the nature of a property right, nevertheless, such a right is not what may be termed as a 'vested right' which may not be changed or modified as the result of a legislative act."

At the time the foregoing Atty Gen Op was written, Sections 7055-58 were nonexistent, having been repealed in 1941. Present sections 7055-58 were added to the Code in 1945 (Stats. 1945 ch. 1159, sec. 1, 2, 3 and 4) and 7059 was amended (Stats. 1945, ch. 1159, sec. 5). Therefore, the part of the Attorney General's opinion dealing with the scope and licensing of a general contractor is not applicable to the law as it now exists.

It is a general rule of law that included within the terms of a contract are existing applicable laws and that the parties intended to make such laws a part of such contract.

The statutes under consideration are regulatory, finding their source in the police power of the state, and having as their object the protection of the public against fraudulent and illegal practices.

The possession of a license to do business in a classified field is necessary to allow a recovery for work performed by a contractor, and a contract made by an unlicensed person is void. FRANKLIN v. NAT. C. GOLDSTINE AGENCY, 33 C. (2) 628 (1949); LEVINSON v. BOAS, 150 Cal. 185 (1907); HOWARD v. STATE OF CALIFORNIA, 85 C.A. (2) 361 (1948).

No appellate court case has been found on the precise point involved here, but in the Superior Court of the State of California in and for the City and County of San Francisco, Charles L. Harney filed suit against the Contractors' State License Board, No. 382355, asking for declaratory relief. The complaint alleged that plaintiff Harney had a general engineering license ("A") and asking the court to decree that under that license plaintiff could perform all types, classifications and phases of construction work, including general building contractor and all specialty classifications. He alleged that at Sacramento, on October 15, 1948, the Board advised plaintiff, et al., that the holder of a general engineering license must, as a condition precedent to bidding for any of the specialties specified in section 732 (Ch. 16, Art. 8, Administrative Code) apply for and procure respective specialty licenses. A demurrer to the complaint was overruled, but on May 12, 1950, Honorable Franklin A. Griffin granted a motion of defendant for judgment on the pleadings on the ground there was no justiciable controversy. The matter was not heard nor adjudicated on the merits. An appeal to the District Court is now pending.

The numerical order of the listing of the three classes of contractors, engineering first ("A"), building contractor second ("B"), and specialty third, seems to offer some significance as to which is the more highly skilled in the three classes, and it would follow from such persuasive reasoning that class 2 ("B") contractor would require additional qualifications to receive class 1 ("A") license.

In view of the existing law, and the regulations of the Board issued pursuant thereto, it is my opinion that the City and County of San Francisco is bound by the provisions of the Business and Professions Code and that, as the low bidder does not have the required license in the classification of General Engineering Contractor, you are compelled to reject his bid.

Respectfully submitted,

DION R. HOLM,
City Attorney.

CWH

To: Mr. Sherman P. Duckel,
Director of Public Works

cc: Mr. Thomas A. Brooks,
Chief Administrative Officer.

OPINION NO. 256

September 29, 1950

SUBJECT: VALIDITY AND REGULARITY OF ADOPTION OF RESOLUTION NO. 10352 (SERIES OF 1939), FILE 6118, APPROVING THE REQUEST OF THE HOUSING AUTHORITY OF SAN FRANCISCO FOR TRANSFER TO THE AUTHORITY BY THE FEDERAL GOVERNMENT OF CERTAIN TEMPORARY HOUSING AND RESOLUTION 10353 (SERIES OF 1939), FILE 6118, AUTHORIZING EXECUTION OF AN AGREEMENT BETWEEN THE HOUSING AUTHORITY AND THE CITY AND COUNTY IN RESPECT TO SAID HOUSING PROPERTIES.

Dear Sir:

On behalf of the Housing Authority of San Francisco, you have made the following request for opinion:

"At its meeting of September 25, 1950, the Board of Supervisors adopted a resolution (File No. 6118) approving the request of the Housing Authority of the City and County of San Francisco for the transfer to it by the Federal Government of certain temporary housing located in the City and County of San Francisco. At this same meeting, the Board also adopted a resolution accepting and authorizing the execution of an Agreement between the City and the Housing Authority relative to the housing properties referred to in the aforesaid resolution, a copy of which Agreement is contained in File No. 6118.

"On behalf of the Housing Authority of the City and County of San Francisco, I have been requested to obtain an opinion from your office to the effect that the above mentioned resolutions were validly adopted by the Board of Supervisors and that said resolutions are legally sufficient as to form."

O P I N I O N

After careful examination of all details relating to your inquiry, I advise you as follows:

1. Resolution No. 10352 (Series of 1939), File 6118, was validly adopted by the Board of Supervisors of the City and County of San Francisco and is legally sufficient as to form.

2. Resolution No. 10353 (Series of 1939), File 6118, was validly adopted by the Board of Supervisors of the City and County of San Francisco and is legally sufficient as to form.

Respectfully submitted,

WP

DION R. HOLM
City Attorney

TO: Mr. William A. O'Brien,
Housing Authority

OPINION NO. 257

September 29, 1950

SUBJECT: VALIDITY AND REGULARITY OF ADOPTION OF RESOLUTION NO. 10354 (SERIES OF 1939), FILE NO. 6117, APPROVING SITES AND LOCATION OF LOW-RENT HOUSING PROJECTS.

Dear Sir:

On behalf of the Housing Authority of San Francisco, you have made the following request for opinion:

> "At its meeting of September 25, 1950, the Board of Supervisors adopted a resolution entitled "Resolution Approving Sites and Location of Low-Rent Housing Projects of the Housing Authority of the City and County of San Francisco" (File No. 6117).
>
> "On behalf of the Housing Authority of the City and County of San Francisco, I have been requested to obtain an opinion from your office to the effect that the above mentioned resolution was validly adopted by the Board of Supervisors and that said resolution is legally sufficient as to form."

OPINION

After careful examination of all details relating to your inquiry, I advise you that Resolution No. 10,354 (Series of 1939), File No. 6117, was validly adopted by the Board of Supervisors of the City and County of San Francisco and is legally sufficient as to form.

Respectfully submitted

DION R. HOLM
City Attorney

WP

To Mr. William A. O'Brien
Housing Authority

OPINION NO. 258

October 2, 1950

SUBJECT: VALIDITY OF PROPOSED ORDINANCE REQUIRING (1) PERSONS EMPLOYED AS PRIVATE DETECTIVES, INVESTIGATORS, PRIVATE PATROL OPERATORS, WATCHMEN OR GUARDS TO OBTAIN PERMIT FROM CHIEF OF POLICE WHEN FIREARMS OR OTHER WEAPONS WILL BE CARRIED IN EMPLOYMENT; (2) PERSONS ENGAGED AS DETECTIVES, INVESTIGATORS, PRIVATE PATROL OPERATORS, WATCHMEN OR GUARDS TO OBTAIN A PERMIT TO CARRY FIREARMS OR OTHER WEAPONS IN COURSE OF EMPLOYMENT.

Gentlemen:

You have asked as to the legality of an ordinance (File No. 6357), the purport and intent of which is to require persons employed as private detectives, investigators, private patrol operators, watchmen or guards to obtain permit from Chief of Police when firearms or other weapons will be carried in employment, (2) persons engaged as detectives, investigators, private patrol operators, watchmen or guards to obtain a permit to carry firearms or other weapons in course of employment.

O P I N I O N

In the absence of a State law covering the same subject matter, the enactment of such ordinance would be a valid exercise of the police power of the city and county for the protection of the public. EX PARTE CHENEY, 90 Cal. 616. See also: 7 McQUILLIN, Municipal Corporations (3rd ed) 466. If, however, a State law covers the same subject matter, a local ordinance cannot be enacted in the same field or be contradictory thereto.

Provisions of the Dangerous Weapons Control Law, (Deering's General Laws, Act 1970), are directly involved. The Dangerous Weapons Control Law provides in part as follows:

> "Except as otherwise provided in this act, it shall be unlawful for any person within this State to carry concealed upon his person . . . . any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm as hereinafter provided in Section 8 hereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor . . ."

Section 8 provides in part as follows:

> "It shall be lawful for the sheriff of a county, and the board of police commissioners, chief of police, city marshal, town marshal, or other member of the police department of any city, city and county, town or other municipal corporation of this state, upon proof before said board, chief, marshal, or other police head, that the person applying therefor is of good moral character, and that good cause exists for the issuance thereof, to issue to such person a license to carry concealed a pistol, revolver or other firearm for a period of one year from the date of such license."

The State has therefore enacted a statute with respect to the carrying of concealed firearms and has prescribed a method of obtaining licenses to carry such weapons under Section 8 of the act.

It is to be noted that the Dangerous Weapons Law refers only to concealed firearms and a local ordinance with respect to unconcealed firearms or other weapons would not be affected by the State law. The question, however, as to concealed weapons is: Can the city and county, in view of the provisions of the State law, provide additional requirements for the right to carry concealed weapons as far as the class of persons mentioned in the ordinance is concerned?

A search of the California cases reflects that there is only one case which deals with the precise question. In PEOPLE v. COMMONS, 64 Cal. App. (2d) Supp. 925, Appellate Department, Superior Court of Los Angeles County, California, the court construed the provisions of a Los Angeles ordinance which, in general, prohibited, among other things, the carrying of concealed or unconcealed firearms by any person without obtaining a permit from the Board of Police Commissioners of Los Angeles County. The court stated as follows:

> "There are several modes by which a local ordinance may come into conflict with the state law . . . . A conflict may exist between law and ordinance because one prohibits what the other authorizes."

and the court stated that there would be such conflict if persons authorized under Section 8 of the Dangerous Weapons Control Law to carry concealed weapons must also obtain a permit from the Los Angeles County Board of Police Commissioners to carry such firearms.

With this opinion in view, Section 840 of the proposed ordinance was drawn in order to avoid, if possible, a conflict with Section 8 of the Dangerous Weapons Control Law so far as concealed firearms are concerned. The police power of the City and County of San Francisco extends to the regulation of a business as may be necessary for the public welfare. In 18 CAL. JUR. 842, the rule is stated as follows:

> "While there is no doubt that the right to pursue a lawful employment is one of the privileges and immunities in which the citizen is entitled to be secured and protected under the constitution and laws, it is only when a business is lawful and has no injurious tendency that the governing body of a municipality may not say who shall and who shall not exercise the right itself. Aside from charter powers upon the subject, municipalities clearly have authority under the constitutional grant of police power to pass ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public welfare."

It has been held that a municipal regulation of detective agencies and private detectives was within the police power of a municipality. See: 7 McQUILLIN, Municipal Corporations (3rd ed) 220. Section 840 of the proposed ordinance, then, is a regulation of the business or activity specified in the section and is within the police power of the City and County of San Francisco. Although in one sense there is conflict with the provisions of Section 8 of the Dangerous Weapons Control Law, so far as the carrying of concealed weapons is concerned, it may well be held by the courts in a court test of constitutionality, that Section 8 of the Dangerous Weapons Control Law was not intended to cover a situation, where, under the police power of the city, a business or activity can be regulated; the conflict is incidental only and does not nullify the admitted power of the city and county to regulate the business or the activity.

Section 840 of the proposed ordinance must necessarily be limited to persons who are not licensed under the Detective License Law of the State of California, (Bus. & Prof. Code, sections 7500-7852), because where the State law prescribes the mode and manner under which a person can engage in a business or occupation, such legislation covers the field and local ordinances which prescribe further or different regulations are invalid. The Detective License Law does not, however, cover persons (1) employed exclusively and regularly by one employer, in connection with the affairs of one employer only, and where there exists an employer-employee relation, or (2) employees of private detectives, private investigators, private patrol

operators, (3) watchmen or (4) guards. Therefore, as to such persons, a local ordinance would be valid.

Section 842 of the proposed ordinance relates to persons who are licensed under State law to carry on the business of private detective, private investigator or private patrol operation and the section is intended and purports to be a regulation requiring a permit from the chief before such persons may carry weapons. The purport of Section 842 is to regulate further than does section 8 of the Dangerous Weapons Control Law, the right of such persons to carry concealed firearms. So far as unconcealed firearms and other weapons not covered by section 8, there is no conflict between section 842 of the proposed ordinance and section 8 of the Dangerous Weapons Control Law.

Section 5 and section 8 of the Dangerous Weapons Control Law refer to "any person" and provide that it is lawful for any person licensed under section 8 thereof to carry concealed weapons, There is doubt as to the constitutionality of section 842 of the proposed ordinance when it imposes additional requirements. There is conflict between the State law and the proposed ordinance, and unless it be held by the courts that the State Legislature did not intend to cover persons in the performance of businesses or occupations which may affect the public safety and public welfare, this portion of Section 842 may be held by the courts to be in conflict with the State law and therefore unconstitutional and invalid.

It is my opinion therefore:

(1) Section 840 of the proposed ordinance (covering persons not licensed under the Detective License Law) is a valid regulation and meets constitutional requirements;

(2) Section 842 of the proposed ordinance (covering persons licensed under Detective License Law)is valid so far as unconcealed firearms and other deadly weapons are concerned. However, so far as its application to concealed firearms is concerned, there is doubt concerning its constitutionality and it may be held invalid as in conflict with the provisions of the Dangerous Weapons Control Law.

Respectfully submitted,

DION R. HOLM
City Attorney

TMO'C

To: Board of Supervisors
Attention: Mr. John R. McGrath

OPINION 259

October 2, 1950

SUBJECT: Park-Presidio Boulevard; Authority of Board of Supervisors to Change Name to Richard J. Welch Boulevard.

Gentlemen:

This office is in receipt of your request for an opinion which reads as follows:

> "I have been directed by the Public Buildings, Lands and City Planning Committee to request that you inform them whether or not the Board of Supervisors has the authority to change the name of Park Presidio Boulevard to Richard J. Welch Blvd.
>
> "Your cooperation in this matter will be appreciated by the Committee."

O P I N I O N

Further investigation has disclosed that the Park-Presidio Boulevard, which runs through Presidio Parkway, and which is located between Funston Avenue (13th Avenue) and 14th Avenue, was placed under the jurisdiction of the Park Commission (now the Recreation and Park Commission) by Ordinance No. 704 on April 7, 1905. The State of California made the Park-Presidio Boulevard a part of the secondary State highway system (Route 56) by virtue of Chapter 767, Statutes 1933, approved by the Governor on June 5, 1933.

Division 1, Chapter 1, Article 3, Section 111, of the Streets and Highway Code, reads as follows:

> "Sec. 111. CONNECTING PORTIONS OF HIGHWAY THROUGH CITIES. (Determination of location.) Whenever the natural course of a State highway passes into or through any city and a State highway route through or around such city is not specifically described by law, the commission shall determine the location of the connecting portion necessary to make the State highway continuous. Such location may be either through or around such city, depending upon the commission's determination as to which location will be of the

greatest benefit to through traffic upon such State highway.

"(Adoption without compensation.) Any portion of any street or highway, within the limits of such city, may be adopted by the commission as a part of the State highway system without compensation to the city."

The pertinent portion of Section 42 of the Charter reads as follows:

"SECTION 42. The recreation and park commission shall have the complete and exclusive control, management and direction of the parks, playgrounds, recreation centers and all other recreation facilities, squares, avenues and grounds which are in the charge of either of said commissions on the effective date hereof, or are thereafter placed in the charge of this commission, including exclusive power to erect and to superintend the erection of buildings and structures thereon, and to construct new parks, squares, playgrounds and recreation centers, except as in this charter otherwise provided."

Should Park-Presidio Boulevard ever be abandoned as part of the secondary State highway system, Section 837 of Division 1 of Chapter 6 of Article 1 would govern:

"SECTION 837. TITLE UPON ABANDONMENT OF EASEMENT OR VACATION OF HIGHWAY: DISPOSITION OF PROPERTY WHERE FEE IN STATE. On abandonment of an easement, title thereto reverts to the owner of the underlying fee. On vacation of a highway, where the State owns only an easement, title likewise so reverts. Where the State owns the property on which the vacated highway was located in fee, the department shall dispose of the property as provided in section 118."

Further research disclosed that the name, Park-Presidio Boulevard, was bestowed by the then Park Commission, now a part of the Recreation and Park Commission.

It is apparent from the foregoing that the Recreation and Park Commission has jurisdiction over the area which has become a part of Route 56 of the secondary State highway system. It further appears that should the Park-Presidio Boulevard be abandoned as part of the secondary State highway system, the Boulevard would revert to the same status it enjoyed previous to its incorporation in the highway system.

The State, when it incorporates a public street into the State highway system, does not concern itself with the name of the street. Thus, in the instant case, Park-Presidio Boulevard became a part of the State highway system under the designation of Route 56 and its name remained unchanged.

The jurisdiction over the Park-Presidio Boulevard being in the Recreation and Park Commission, it appears that this Commission would have jurisdiction over the name to be bestowed upon this Boulevard.

You are advised that the Board of Supervisors does not have the authority to change the name of Park-Presidio Boulevard, as this authority is in the Recreation and Park Commission by virtue of the provisions of Section 42 of the Charter.

Respectfully submitted,

RJB

DION R. HOLM
City Attorney

To: Board of Supervisors
Attention: Mr. John R. McGrath

cc: Recreation and Park Commission
Office of the Mayor

Opinion No. 260
October 4, 1950

SUBJECT: CAN A MEMBER OF THE FIRE DEPARTMENT BE SEPARATELY PENALIZED FOR A VIOLATION OF EACH RULE VIOLATED WHEN ONLY ONE INCIDENT IS INVOLVED.

Dear Sir:

I have your request for an opinion as to whether under the provisions of §155 of the Charter a member of the Fire Department guilty of a single act which constitutes a violation of four different rules of the Fire Department may be punished for such act by

(a) A separate fine or suspension for each rule violated,

or

(b) Fines exceeding one month's salary.

O P I N I O N

The applicable part of §155 of the Charter is the first paragraph thereof, which reads:

> "Members of the fire or the police department guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not exceeding three months, or by dismissal, after trial and hearing by the commissioners of their respective departments." (Emphasis added.)

In providing for "punishment by fine not exceeding one month's salary" and for "suspension for not to exceed three months" (emphasis added) this section of the Charter clearly attempts to restrict and limit, in certain respects, the punishment to which a member may be liable, in order that there may be no cruel or inhuman punishment. But in using first the expression "offense or violation of the rules and regulations", and secondly, only the single word "offense", the section is ambiguous. Therefore, it is subject to the general rules of statutory construction.

It is clear that the Charter framers intended that a member guilty of a "violation of the rules and regulations" should be liable to be punished, and therefore that the use of only the word "offense" in the second instance was an inadvertence. This view is in accord with the interpretation placed upon §155 by the Department, which, I am informed, has not in actual practice construed the word "offense", as used the second time, as excluding punishment for "violation of the rules and regulations" of the Department, but has throughout the years imposed fines upon members for such violations.

It is not unusual for Charter provisions to contain inadvertent or loosely used language. For example, in SKELLY ESTATE CO. v. SAN FRANCISCO, 9 Cal. (2d) 28, the court, in a case involving the use of an improper word, held the word "resolution" was intended to mean "ordinance".

In §155 of the Charter the word "incident," or a similar word, would more accurately convey the meaning intended by the word "offense" as secondarily used; and by the substitution of "incident" for "offense", where used the second time, the ambiguity is removed.

Now, assuming that the word "offense", as used the second time, should be construed to mean "incident", or a word similar in meaning, it is evident that the punishment was intended to cover the incident as such, and was not intended to apply separately to each rule violation involved in the incident. Were this not so, the clear intent of the section to limit the punishment could be avoided by the adoption of a multiplicity of rules.

As an example, a member of the Fire Department might violate a rule requiring him to be on duty at a certain hour. This probably would involve neglect of duty as well as the violation of a specific rule. But since there would be only a single incident involved, the fireman would be liable for only one punishment, regardless of the number of rules applicable to the incident and violated thereby; and if the punishment were by fine, it could not exceed "one month's salary".

It is my opinion, therefore, that separate punishments cannot be meted out to a member of the Fire Department on each of several different charges if these several charges involve only one particular incident, but that the punishment should cover only the incident itself; and similarly, that punishment by fine cannot exceed "one month's salary" for any one particular incident. Of course, if there are separate and distinct incidents, each would be subject to separate punishment.

Respectfully submitted,

DION R. HOLM,
City Attorney.

VB

To: Mr. Thomas W. McCarthy,
Secretary, Fire Commission.

No. 261

October 3, 1950

SUBJECT: 0 208 GENERAL FOREMAN OF SEWER CONNECTIONS AND REPAIRS; FIXING OF RATE OF PAY FOR SUCH POSITION

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Demand has been made on this Commission that the wages of three employees in the class of 0208 General Foreman of Sewer Connections and Repair be fixed under the provisions of section 151.3 of the charter rather than section 151 of the charter.

"The Commission has heretofore ruled that the wages of such employments are subject to the provisions of section 151. The facts are as follows:

"These positions are established in the Bureau of Sewer Repair, Department of Public Works. All of the positions are presently occupied by employees who formerly held, for long periods of time, civil service status as Bricklayers. They acquired their present positions through promotional examinations which were open to employees holding civil service appointment in any one of the four classifications, namely, Bricklayer, Hod Carrier, Cribber, and Sewer Cleaner.

"The occupants of these positions are therefore not required to have the qualifications and training and experience of journeyman bricklayers, although the individuals currently occupying these positions do possess these qualifications. The duties of the position are as follows:

> "0208 GENERAL FOREMAN, SEWER CONNECTIONS AND REPAIRS - Under general direction: regularly plans and directs the work of several groups of subordinates, which groups may be working at different locations in excavating, laying pipe, and backfilling in connection with the installation and repair of sewers and side sewers; keeps time of subordinates; requisitions and checks delivery of materials; investigates complaints; makes required reports; and performs related duties as required.

"One of the occupants is regularly assigned the duty of supervising the repair and maintenance of main sewers. As such, among other employees he has supervision over the work of bricklayers when assigned to such duties. One other

of the occupants is regularly assigned the duties of installation of side sewers, which duties do not normally involve the supervision of the work of bricklayers. The third employee is normally assigned the duty of investigating complaints, and in the performance of these duties he is not required to supervise the work of bricklayers. Every third week each of the three occupants has heretofore been required to be on duty on Saturday morning, during which service he may be required to issue orders to bricklayers.

"The Chief Administrative Officer has advised us that in his opinion the occupants of these positions are not required to possess the qualifications of journeyman bricklayers, and as stated above the examinations have been open in the past to hod-carriers, cribbers and sewer cleaners as well as bricklayers, and representatives of these crafts, other than bricklayers, have in the past occupied one or more of the positions under civil service appointment.

"The present wage of this classification, fixed pursuant to the provisions of section 151, has a maximum of $440 per month. Bricklayers, fixed under the provisions of section 151.3 of the charter, receive $25 per day or approximately $530 per month.

"The employees of the positions in question urge that their positions involve supervisory duties, including on occasion supervision of the work of journeyman bricklayers, and that their duties carry more responsibility than that of a bricklayer and that they are receiving less money than they would now receive had they remained in the service of the city as bricklayers.

"The bricklayers' contract in private employment, under which wages of bricklayers are fixed, provides in part as follows:

> "When three or more Bricklayers or Stone Masons are employed on one job, one of the three shall be designated as a foreman and paid not less than $2.00 per day above the regular rate. There shall be but one foreman over a crew. No Bricklayer or Stone Mason shall receive orders from any person other than the Foreman and when shifts are being worked no Foreman shall work on or have charge of

more than one shift. Each shift shall have its own Foreman and all Foremen shall hire and discharge the men on their crew or shift."

"Will you kindly advise us if in your judgment the wages of these positions, namely, those positions allocated to class 0208 General Foreman of Sewer Connections and Repairs, should be fixed under the provisions of section 151.3 rather than section 151 of the charter."

O P I N I O N

Initially, it must be noted that the three employees in question no longer have any civil service status in the classification A 56 Bricklayer, other than the privileges afforded them under the reduction in force provisions of Rule 26 of the Civil Service Commission. Their present civil service status is only in the classification 0 208 General Foreman of Sewer Connections and Repairs.

Among other things, Section 141 of the Charter declares that, "No person shall hold a position outside of the classification to which he has been appointed." In Dunn v. Civil Service Commission, 3 Cal. App. (2) 554, the Court held that the above noted provision of Section 141 necessarily prohibited payment to any employee of any compensation outside that fixed for the position in which such employee had civil service status.

Under the facts disclosed in your request, the three men in question, while possessing such, are not required to exercise the skills of a journeyman bricklayer, nor was the possession of such skills the sole qualifying requisite for the taking of the examination for the positions of 0 208 General Foreman of Sewer Connections and Repairs. The possession of such skills is not determinative of their right to a rate of pay fixed under Section 151.3 rather than Section 151. (see Goodrich v. City of Fresno, 74 Cal. App. (2) 31; Doyle v. City of New York, 266 N.Y.S. 227)

In the Goodrich case, supra, certain employees of the City of Fresno contended that they had been improperly classified and that they should have been paid, on the basis of a "prevailing wage" section of the Fresno Charter, a wage equal to that paid to privately employed persons (in Fresno) in the occupations which the plaintiffs claimed they were following in city service. Judgment was rendered in favor of the city, and affirmed on appeal. In the process of affirming, the Court said the following: (page 36)

"It may be conceded, as argued by appellants, that Section 85 of the Fresno Charter is clear, definite and enforceable, that a prevailing wage statute should be liberally construed in favor of the worker, and that the city officials have no discretion or

right to pay these employees less than the prevailing wage referred to in the charter provision. On the other hand, the city officials have a certain discretion in the matter of classifying city employees and assigning certain duties to them as required by another charter provision. The provisions of section 85 are directly related to the trade in which the employee is actually working and not merely to some trade in which he may happen to be skilled. In comparing wages paid in city service and in private employment a comparison of the work actually done is essential. And the highest-paid type of work within a trade may not be arbitrarily taken as the standard unless the work actually done by the city employee comes not only within the trade but within that type." (emphasis added)

The Civil Service Commission, possessing plenary power over the subject of civil service classification (charter section 141), has made an implied determination that the employees concerned herein are not Foremen Bricklayers, even though it may be that during times in their service they supervise the work of journeymen bricklayers. Because of that implied determination, which cannot be overthrown unless palpably arbitrary and capricious (Pratt v. Rosenthal, 181 Cal. 158; Leftridge v. City of Sacramento, 59 Cal. App. (2) 516; 62 C.J.S. 1443) the three employees concerned are not entitled to the benefit of the prevailing wage (of bricklayers under collective bargaining) provisions of Section 151.3 (see Goodrich v. City of Fresno, supra).

You are advised that under the facts as disclosed in your request, viewed in the light of the law set out above, it was proper to fix the wage rate of O 208 General Foreman of Sewer Connections and Repairs under Section 151 rather than Section 151.3 of the Charter.

Respectfully submitted,

DION R. HOLM
City Attorney

WFB
TO: Mr. William L. Henderson
Personnel Director and Secretary
Civil Service Commission

Opinion No. 262
October 4, 1950

SUBJECT: THE RIGHT OF THE ESTATE OF A DECEASED EMPLOYEE TO COLLECT PAY FOR VACATION EARNED BUT NOT TAKEN (MARTIN H. GERRY).

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Transmitted herewith is copy of letter received by the undersigned, dated August 11, 1950, from Morrison, Hohfeld, Foerster, Shuman and Clark re Estate of Martin H. Gerry, III, deceased.
>
> "Will you please give this office a ruling with respect to the request of the attorneys for decedent in the matter of two weeks vacation pay?"

O P I N I O N

The above request relates to the amount of money owed by the City to the Estate of Martin H. Gerry, III, who was the highly efficient Purchaser of Supplies for the City and County and who unfortunately died June 10, 1950.

The Charter provision dealing with the right of an employee of the City and County of San Francisco to take a vacation with pay is found in Section 151, which reads in part as follows:

> "(Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment.)"

This section is self-explanatory and gives to persons employed, so long as they continue in their employment, the right to a vacation with pay of two calendar weeks for each year. The purport of your request is, can the estate of a deceased employee collect for this two-week period although no vacation could possibly be granted.

The purpose of a vacation, as my predecessor and I have stated on a number of previous occasions, is to give the employee the opportunity to relax for a period during the working year. The employee, it is felt, will be much better suited for the continuation of his work after this period of recreation.

It is obvious that the prime purpose of a vacation cannot possibly be met in the case of Mr. Gerry, which, combined with the fact that he is no longer an employee of the City and County of San

Francisco, would prohibit his estate from receiving any money for the ensuing vacation period of the year in which he died.

I must therefore regretfully advise you that no payment may be made for the vacation not taken by Mr. Gerry.

Respectfully submitted,

DION R. HOLM,
City Attorney.

BJW

To: Mr. Harry D. Ross,
Controller.

Opinion No. 263

October 6, 1950

SUBJECT: SAN FRANCISCO HOSPITAL: PAYMENT OF BILL FOR LESS THAN FULL CHARGES CONSTITUTES ACCORD AND SATISFACTION WHEN.

This office is in receipt of your request for an opinion, as follows:

"Enclosed herewith are the following documents:

Copy of claim against the City and County of San Francisco from the Public Administration (Estate of Carl J. Peterson Probate number 114651 amount $678.28)

Copy of letter to Phil J. Katz, Public Administrator, from T. E. Albers, M.D., Superintendent, San Francisco Hospital.

"May we have your opinion as to whether the Hospital's acceptance of Seven hundred fifty dollars($750.00) would constitute a compromise for full services; or whether they were within their legal rights to bill the Public Administrator for the balance of $678.28 due, when it was later ascertained that the estate contained enough money to pay the entire bill.

"The patient was discharged from the Hospital on March 31, 1949, he expired on April 26, 1949."

O P I N I O N

According to Dr. Albers' letter to Mr. Katz, Mr. Peterson was a patient at the San Francisco Hospital from November 15, 1948 to March 31, 1949, at a total hospitalization cost of $1,428.28. On April 12, 1949, Mr. Peterson was presented with a bill in the amount of $750.00, which he paid. Dr. Albers stated that Mr. Peterson was advised that the sum of $750.00 would settle the obligation in full and that at the time the employees of the Health Service were informed correctly concerning the financial status of Mr. Peterson. This office has also been advised that Mr. Peterson was thereupon given a receipt for a "payment in full."

The bill for the $750.00 was issued under the authority of Section 151 of the San Francisco Health Code, by which, the Director of Health is empowered to bill a patient for services, in full or in part, in proportion to the patient's ability to pay.

California Civil Code, Section 1524, provides as follows:

> "Part performance of the obligation . . . where expressly accepted by the creditor in writing, in satisfaction or rendered in pursuance of the agreement in writing for this purpose, though without any new consideration, extinguishes the obligation."

In the absence of fraud or mistake (which does not appear to be present under the facts of the case) - such an acceptance constitutes an accord and satisfaction of the obligation under the provisions of California Civil Code, Section 1524. (See also, 1 CAL. JUR. 130)

It is my opinion, therefore, that the San Francisco Hospital is precluded from filing a claim for the balance of the bill in the estate proceeding.

Respectfully submitted,

DION R. HOLM
City Attorney

TMO'C

To: Mr. Harry D. Ross
Controller

OPINION NO. 264

October 9, 1950

SUBJECT: LEGALITY OF PROVIDING UNIFORMS FOR VOLUNTEER MEMBERS OF POLICE AND FIRE RESERVE OF SAN FRANCISCO DISASTER CORPS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

"Upon the recommendation of the San Francisco Disaster Council, our Disaster Ordinance was recently amended to provide for the establishment of a Police and Fire Reserve of 800 for each reserve. Recruitment of the reserves is currently under way. Each reservist will serve on a voluntary basis without remuneration and will be subject to rules and regulations as provided by the respective departments.

"It has been proposed, in order to establish the highest morale and esprit de corps among the reservists that uniforms be provided by the City and County of San Francisco. Such a proposal contemplates that the uniforms will remain the property of the City and County of San Francisco and issued to each reservist with the understanding that the uniform will be returned by the reservist if at any time his service in the respective Corps is terminated.

"In view of the fact that each member of the reserve will be giving his time as a public service in this period of emergency, it is felt that an obligation rests on the part of the City and County of San Francisco to provide these uniforms.

"During the last war an arrangement was worked out whereby $1.00 per hour up to a maximum of 50 hours' service was allowed each police reservist with the

stipulation that this money would be used to purchase a uniform. Mr. Burton Washburn, Secretary of the State Disaster Council, has informed John D. Sullivan, Executive Secretary of the San Francisco Disaster Council and Corps, and Thomas Blanchard of your staff, that such a procedure might result in the reservists being classified city employes rather than volunteers and thus deprive them of the benefits of the State Workmen's Compensation. I do not wish to jeopardize in any manner the rights of the volunteers in our disaster relief or civil defense program to the benefits of Workmen's Compensation.

"Request is made, therefore, for an opinion as to the legality of providing uniforms by the City and County of San Francisco to the volunteer members of the Police and Fire reserve with the understanding that the uniforms are the property of the City and County of San Francisco."

O P I N I O N

In answer to your request, you are advised that it is my opinion that the City and County of San Francisco may legally provide uniforms to be used by volunteer members of the Police and Fire reserves, provided that said uniforms at all times remain the property of the City and County of San Francisco.

Respectfully submitted,

DION R. HOLM
City Attorney

TJB:

To: Honorable Elmer E. Robinson
Mayor

No. 265
October 10, 1950

SUBJECT: DISMISSAL OF HEAD NURSE DURING PROBATIONARY PERIOD.

Dear Sir:

This office is in receipt of a request for an opinion as follows:

"Please refer to that portion of section 148 of the charter which deals with the termination of the probationary appointments, and particularly that portion referring to termination of appointments resulting from a promotional examination.

"You will recall that prior to 1946 this section provided that at any time before the expiration of the probationary period the appointing officer could terminate the appointment, and it provided also that in such instances the Commission shall inquire into the circumstances and may declare s uch person dismissed or may return the name to the list of eligibles for certification to another department.

"In 1946 the section was amended so that a distinction is now made in the rights of probationary appointees terminated from entrance positions and the rights of such probationary appointees terminated from promotional positions. This section now provides:

'*** At any time during the probationary period the appointing officer may terminate the appointment upon giving written notice of such termination to the employees and to the Civil Service Commission specifying the reasons for such termination. Except in the case of the uniformed members of the P olice and Fire Departments, the Civil Service Commission shall inquire into the circumstances. If the appointment resulted from an entrance examination the Commission may declare such person dismissed or may return the name to the list of eligibles for certification to another department. If the appointment resulted from a promotional examination the employee shall have the right of appeal and hearing before the Civil Service Commission. ***'

"There is now before the Commission an appeal of an employee serving a probationary appointment as Head Nurse in the Department of Public Health as the result of a promotional examination. The appointment has been terminated by the appointing officer. The claim is made by the attorney representing this employee that the action of terminating the appointment was illegal on various grounds. Among the circumstances which this attorney alleges renders the action illegal is the fact that the appointing officer did not hold a formal hearing before terminating the appointment similar to the hearing required under section 154 of the charter when a permanent employee (who has completed his probationary period) is dismissed.

"Will you kindly advise us if under section 148 of the charter the appointing officer is required to hold a hearing before terminating the probationary appointment of a person appointed to such position from a promotional examination."

In addition to the question asked in the above request, you have asked the following questions orally:

1. If the Civil Service Commission must grant a hearing to the employee referred to in that portion of Section 148 of the charter, quoted in the request, what rules and what procedure must be followed at the hearing?

2. If a formal hearing is required must the witnesses be sworn before they testify?

O P I N I O N

I am setting forth that portion of Section 148 which deals with the dismissal of probationary appointments in greater detail than appears in your request.

"Any appointment to a position declared permanent by the civil service commission shall be on probation for a period of six months, provided that the probationary period for entrance positions in the uniform rank of the police department shall be for one year. At any time during the probationary period the appointing officer may terminate the appointment upon giving written notice of such termination to the employees

and to the civil service commission specifying the reasons for such termination. Except in the case of uniformed members of the police and fire departments the civil service commission shall inquire into the circumstances. If the appointment resulted from an entrance examination the commission may declare such person dismissed or may return the name to the list of eligibles for certification to another department. If the appointment resulted from a promotional examination the employee shall have the right of appeal and hearing before the civil service commission. The commission shall render a decision within thirty days after receipt of the notice of termination and (a) may declare such person dismissed; or (b) order such person reinstated in his position without prejudice, and the commission may in its discretion order that the employee be paid salary from time of the termination of his appointment; or (c) order the return of such person to the position from which he was promoted."

An analysis of this section indicates that it deals with the termination of all probationary employees. It provides that the appointing officer shall have the right to summarily terminate any appointment during the probationary period, provided that the requirements of the section so far as notice to the employee and to the Civil Service Commission are fully complied with. The following language of Section 148:

"If the appointment resulted from a promotional examination the employee shall have the right of appeal and hearing before the Civil Service Commission,"

shows a clear intent to give to the employee the right of appeal from the summary action of dismissal by the appointing officer and after such appeal has been perfected the right of a hearing before the Civil Service Commission to whom the appeal is directed. Nothing in the section can in any way be construed to require that the appointing officer conduct a hearing before he terminates these appointments. Had there been any intention to require such action on the part of the appointing officer the proponents of the amendment to this section, in 1946, could have provided for this. Since there is express provision for "hearing" on appeal, it must be concluded that the omission of such provision regarding the appointing officer's action was intentional.

Therefore, I advise you that there is nothing in Section 148 which would require that an appointing officer, before he may terminate the appointment of a person in a promotive classification, must grant that person a hearing.

The first oral question asked by you, concerns itself principally with the type of hearing that would be required pursuant to the provisions of Section 148 quoted above, and the procedure to be followed. McQuillin on Municipal Corporations (3rd Ed - 1949), contains a complete and detailed discussion of the problem of the type of hearing that must be conducted before administrative boards such as the Civil Service Commission in matters dealing with dismissals. Those observations are to be found at various places in that volume between pages 328 and 419.

I will not burden this opinion with a lengthy analysis of these sections, but because of their importance in the analysis of the question proposed, I will quote variously from them in order to show the general law concerning the manner and conduct of this type of hearing.

> ". . . Where power to remove is conferred and the procedure thereof is not specified, the law will imply authority to do whatever is proper to execute the power, consistent with the right of the accused to a fair and impartial hearing, which action must provide for notice, charges and opportunity to be heard. In such case the substantial principles of the common law should be observed. . . ." (page 332)

> ". . . Of course, a full compliance with the rules governing trials in court is not required, and removing officers and boards 'are not bound by the hard and fast rules in exercising the power of removal that ordinarily surround and influence a court whose functions are purely judicial.' However, the substantial principles of the common law affecting private rights must be observed in the absence of controlling provisions to the contrary. . . ." (page 336)

> ". . . Although the hearing is not required to be held in strict conformity with the judicial procedure required in a court of law, the officer or tribunal hearing the charges is bound to a reasonably strict observance of all legal requirements and the fundamentals of a fair and impartial trial. . ." (page 359)

> ". . . In proceedings before civil service boards and commissions, substantial rather than technical compliance with requirements of law and regulations will be sufficient." (page 359 - 360)

> ". . . The right to a hearing indubitably includes oral argument, either by the accused or his representative before the officer or tribunal having power of decision, and such right is not satisfied by permitting it before a committee. . ." (page 361)

". . . However, in such procedure the trial may be more informal than in regular court proceedings, and more latitude may be permitted in the admission and consideration of evidence. . ." (page 367)

". . . Moreover, while technical rules of evidence need not be observed, there should be no abuse of discretion in admitting or excluding evidence. The evidence should be limited to the charges. . ." (page 370)

From these extracts taken from this recognized authority in the field of municipal law it is evident that the hearing which you must hold in accordance with the charter provision must substantially comply with the conditions set forth above. As was said in State v. Milwaukee, 157 Wis.505, 147 N.W. 50:

"There are at least three substantial elements of a common-law hearing: first, the right to know reasonably the charges or claims preferred; second, the right to meet such charges or claims by competent evidence; and, third, the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto. If either of these rights are denied a party, he does not have the substantials of a common-law hearing."

In Reardon vs. Daly City 163 Pac. (2nd) 462, the question of the type of hearing that must be given where an employee's dismissal was discussed by the court, and at page 465 the court quoted as follows:

". . . There are several recognized precedents, however, that have been established in this and in the majority of other jurisdictions as a guide to determine such rights. If the administrative body, such as a local board, has been clothed with quasi-judicial functions (Grief v. Dullea, 66 Cal. App. 2nd 986, 153 P.2d 58), there must be a hearing of the character of an informal trial in accordance with the provisions of the controlling law. . ."

I advise you therefore that the hearing provided for by that portion of Section 148 of the charter which is under consideration, must be one that possesses the substantial rights of a common-law hearing.

The second oral question concerns the necessity of swearing witnesses who are to testify in the hearing. This matter is not covered either in Section 148, nor anywhere else in the charter. Consequently, we must look at the general law of the State for guidance. The Code of Civil Procedure sets forth the standards under which a witness may testify, reading as follows:

> "§ 1846. /Testimony to be on oath or affirmation and in presence of parties./ A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine."

However, in the case of Tennant vs. Civil Service Commission, 77 Cal. App. (2) 489, where the question concerning the matter of sworn testimony was before the court, the Appellate Court discussed the matter in the following language:

> "As to the oath not being administered, petitioner did not object to the manner in which the proceeding was conducted, and did not object to statements being made which were not under oath. Permitting a person to testify without being sworn is not a jurisdictional matter but is at most a judicial error which cannot be taken advantage of except upon timely objection being made."

The court also referred to the case of Trigueiro vs. Skow, 24 Cal. App. (2) 253, which likewise went into this question and commented on it in the same manner. I advise you therefore concerning the swearing of witnesses, that under the Code of Civil Procedure all testimony, if it is to be used as such, must be under the oath or affirmation of the witness unless the circumstances are such as was indicated in the Tennant case. However, it is my belief that the better practice would be to require all testimony taken at these hearings to be under the oath or affirmation of the person testifying.

Respectfully submitted,

DION R. HOLM
City Attorney

BJWJr

To: William L. Henderson
Personnel Director & Secretary
Civil Service Commission

No. 266
October 20, 1950

SUBJECT: U-DRIVE SERVICE AT AIRPORT - RIGHT OF OTHERS THAN BARRETT U-DRIVE AT AIRPORT - HERTZ DRIVURSELF - YOSEMITE GRAY LINE LIMOUSINES, INC. - FIALER'S LIMOUSINES, INC.

Dear Sir:

We are in receipt of your request for an opinion upon the above subject matter. Before referring to your specific inquiries, it will aid in clarity first to set forth the facts stated in your communication. These follow:

Under date of January 18, 1950, City and County of San Francisco, through its Public Utilities Commission, granted an exclusive concession, for a period of one year, to Barrett Garages, Inc. (hereinafter called "Barrett"), to operate at the Airport a U-Drive rent car business. In that agreement, there is a covenant upon the part of the City to prohibit any person other than Barrett from conducting a like business on the Airport property. Your office has become aware that other U-Drive services are being operated from the Airport and have been so operated subsequent to the date of the agreement with Barrett. You mention, as among these concerns, Hertz Drivurself (hereinafter called "Hertz") and Yosemite Gray Line Limousines, Inc., doing business as Gray Line U-Drive (hereinafter called "Gray Line").

You are in possession of information that representatives of Hertz have utilized the Airport Public Address System to page passengers arriving upon planes to whom, immediately thereafter, a Drivurself vehicle has been delivered.

You further state that Fialer's, at the times with which we are here concerned, was the grantee of a concession agreement from the City under which Fialer's operates equipment on ground transportation to and from the Airport. This is inclusive of motor buses, taxicabs (now under assignment to Yellow Cab Company), and chauffeur-driven limousines. In the Fialer's agreement, on page 8 thereof, there is a covenant upon the part of the concessionaire that it will not engage in any business at the Airport other than that permitted under the terms of the agreement.

At the middle of page 2 of your communication, you make reference to the fact that the Gray Line and Fialer's are "associated or affiliated enterprises" and that "Mr. Gene E. Holmes is President of each of them." These facts do not, standing alone, establish a sufficient showing that either corporation may be regarded as an alter ego. Erkenbrecher v. Grant (1921), 187 Cal. 7, 11.

On the other hand, if there were a sufficient showing by which the separate identity of each corporation were to be disregarded, we would, of course, consider Gray Line bound by the agreement executed in the name of Fialer's only. However, for present purposes, it is unnecessary to determine whether the seeming separate identities of Fialer's and Gray Line are to be disregarded.

Your letter sets forth the claim of Gray Line to the effect that all of the patronage contacted by it at the Airport is by virtue of orders transmitted to it from other points in California, from locations throughout the United States, or from points outside the United States. We offer the modification that, according to the attorney for this concern, its activity at the Airport (with respect to U-Drive service) is confined to orders originating from outside the State of California. These are received, according to that attorney, by mail, telephone, telegraph, teletype, or other means of communication to Gray Line's San Francisco office. Upon the basis of such state of facts, it is contended by Gray Line that its operations are not in conflict with the exclusive concession granted Barrett, in that, to inhibit such activity, would be an unreasonable and unlawful interference with the right of private contract between Gray Line and its customer. We may add that, in reaching the conclusions herein expressed, our views apply whether the origin of the order is within or outside the State of California. In the instance of an order from a customer having its origin from outside the State, there is, of course, the added element of an attempted burden upon interstate commerce, forbidden by the Constitution of the United States (Section 8). However, the opinion which we express does not necessarily rest upon the existence of a transaction in interstate commerce.

O P I N I O N

Although not in so many words stated, there is implicit in your communication this general question:

> May the City and County of San Francisco complain, upon basis of law, against alleged invasion upon this exclusive concession, when such alleged invasion is based upon fulfillment of an order for a U-Drive car received from elsewhere than upon the Airport?

Our answer to this inquiry is in the negative. Of course, due consideration has been given to your assertion, to which we readily agree, that revenue from concessions must necessarily form

a substantial basis for the cost of operation of the Airport. However, there is such strong indication from court decisions that the operation of a concession of this character cannot unduly interfere with the freedom of private contract, that there appears to be no escape from the conclusion that a passenger arriving at the Airport cannot be prevented from making individual arrangements in advance for a U-Drive automobile to be furnished to him upon his arrival.

There is no question that various exclusive privileges may be granted at the Airport in the form of concession agreements and that operation of the same may be subjected to rules and regulations, reasonable in nature. However, it must be granted that the public, in general, is invited to use the Airport for transportation in and out; a private arrangement by which a traveler obtains a vehicle with which to arrive upon or depart from Airport premises, therefore, cannot, with legality, be inhibited.

A field of monopoly can be created in a concession agreement; it must, however, be limited within proper bounds.

For example, it must remain unquestioned that the solicitation of taxicab fares could, in the interest of public tranquility and convenience, be restricted upon Airport premises to one concern. Likewise, it could not, with reason, be contended that the Airport management, through the Public Utilities Commission, could legally and successfully prevent the entry upon the Airport of a taxicab of a company other than a concessionaire for the purpose, only, of delivering a passenger at the Terminal Building.

Further, it could not, with reason, be maintained that an individual, arriving at the Airport, could be prevented from making arrangements by which he would arrive or be driven away in his own private car, utilizing, in either instance, Airport premises. For all practical purposes, a U-Drive car, which an arriving passenger has arranged to hire, is, during the period of hire, his own private car.

There can be no question that the Public Utilities Commission had full legal authority to grant an exclusive concession to Barrett to conduct a U-Drive car business at the Airport.

Demeter v. Annenson (1947),
80 Cal. App. (2d) 48;

Annotation in 15 A. L. R. 356;

44 Am. Jur. 351.

The above authorities concern grants by railway corporations of exclusive taxicab concessions on station property. The same holding is readily applicable in the matter under consideration. However, the existence, upon a legal basis, of an exclusive concession does not meet the problem at hand. The protection of the concessionaire cannot extend to the point where there is undue interference with the inherent right of private contract.

A painstaking research has failed to disclose an authority precisely in point. However, in the various cases announcing the rule designated in the Annotation in 15 A. L. R. 356 (Supra), as "the majority rule"--that such exclusive concession granted by a railway is valid(the rule adopted in California in the Demeter case (Supra))--there is strong intimation that the right of private contract is not to be denied. In other words, the exclusive concession is confined to solicitation and negotiation of a contract upon the Airport premises; it still remains true that a traveler arriving at the Airport may in advance arrange to be met by any vehicle of his choice.

In Montana Union Ry. Co. v. Langlois (1890), 24 Pac. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753, a railroad company went to the length of attempting to exclude hackmen from its premises endeavoring to serve arriving passengers at its depot who desired such particular service. The Court there held that the railroad company was going too far and issued an injunction against such practice.

Our District Court of Appeal of the First Appellate District, in Demeter v. Annenson (1947), (Supra), 80 Cal. App. (2d) 48, expressly recognized the soundness of the foregoing Montana decision, having this to say (middle of p. 51):

> "A reading of the opinions in the five states that have adopted the minority view discloses that the courts there involved were of the opinion that such contracts are discriminatory, stifle competition and subject the railroad's passengers to the inconvenience of having to use cabs of the railroad's choosing rather than of their own choosing. One of the leading cases adopting this view is Montana Union Ry. Co. v. Langlois, 9 Mont. 419 /24 P. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753/. At page 431 the court stated: 'It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff such as to stifle the natural development

> of such competition?' And again at page 433 the following appears: 'But has the railroad company in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that if the passenger obtains the use of these conveniences and facilities he must purchase the privilege from such hackman or suffer discrimination?'
>
> "A reading of this case indicates that the Montana court was passing on a different point than the one involved in the instant case. In that case the plaintiff railroad company sought not only to enjoin the defendant cab company from entering its premises to solicit patronage, because an exclusive privilege had been granted another company, but also sought to restrain the defendant from entering the railroad premises to pick up a passenger who desired service, and to prevent defendant from depositing a passenger headed for the depot nearer than fifty feet from the station. In the instant case the respondent does not seek such drastic relief. Respondent expressly conceded at the trial that appellant had the legal right to enter the depot premises to pick up a passenger who had telephoned for such service, and to enter the depot premises to deposit a passenger who had hired appellant to drive to the depot. The injunction simply prohibits appellant from soliciting passengers on the depot premises and from parking on such premises for the purpose of such solicitation."

We are of the view that there is such strong indication in the California (Demeter) case of the soundness of the Montana decision that the only conclusion to be drawn is that there are no facts presently before us indicative of other than lawful conduct, in general, upon the part of any concern supplying an order received from elsewhere than upon the Airport for a U-Drive car.

It is also to be recognized that no person can be permitted to use the facilities of the Airport without payment therefor. However, we regard your reference to the use of the loud speaker on one occasion in the location of a passenger as of minor importance and one that, upon warning, would probably not be repeated.

We turn to specific answers to your severally stated inquiries.

Your initial inquiry is as follows (top of page 4):

> "A - Are or are not, in your Opinion, the hereinbefore described unauthorized operations by other u-drive car rent services at or from the Airport in conflict with the provisions of the above mentioned Agreement of January 18, 1950, thereby subjecting the City and the Public Utilities Commission to a valid claim by Barrett Garages, Inc. of violation of its rights and the City's and Commission's obligations?"

We do not consider that in the agreement of January 18, 1950, creating a concession in favor of Barrett, the City has undertaken to bar from the Airport persons supplying U-Drive vehicles under a contract not solicited or entered into at the Airport. Therefore, we are of the opinion that Barrett has no claim against the City under such circumstances.

Your second inquiry is as follows (top of page 4):

> "B - If your Opinion with regard to (A) is that there is no conflict, therefore no basis for valid claim by Barrett Garages, Inc. as above stated, may or may not, in your Opinion, Barrett Garages, Inc. avoid the payment of fees on the basis of its claim that some, or to exaggerate, all of the service furnished by it at or from the Airport was reserved through one of its branches or through an associate member of the National Car Rental System?"

We are of the view that Barrett cannot avoid the payment of fees on the basis stated. This is true for the reason that Barrett, in contrast to the other concerns, is actually engaged in business at the Airport and all branches of its U-Drive service, regardless of the origin of the order, must necessarily be subjected to its percentage agreement. Section 2 of Part I of the General Rules and Regulations is quite clear in providing that no person shall use the Airport for revenue-producing commercial activities without securing an appropriate permit for such activities from the Public Utilities Commission and paying the rates and charges prescribed for such use. There can be no question that Barrett has subjected itself to such rule, has obtained

the necessary consent from the Public Utilities Commission and has subjected itself to the agreed rate, regardless of the origin of any of the orders filled by it.

Your next inquiry is as follows (bottom of page 4):

"A - Is or is not, in your Opinion, the Airport being deprived of revenue rightfully earned by it by virtue of having developed and having available the facilities through which the patronage is picked up, regardless of the source from which reservations were made for Gray Line U-Drive equipment?"

It is our opinion that the Airport, through the type of orders referred to above, emanating from elsewhere, is not being deprived of revenue rightfully earned by it. The only utilization of facilities that we can conceive of, in the proper operation of such business by competitors of Barrett, goes no further than entry upon the Airport in the same manner as the public in general, together with the making of such reasonable arrangements by which contact can be made with the customer.

Your next interrogation is as follows (bottom of page 4 and top of page 5):

"B - If it is your Opinion with regard to (A) that the Airport is being deprived of rightfully earned revenues, should not the Public Utilities Commission, with the consent of Barrett Garages, Inc., formally authorize restricted operations by u-drive car rent companies other than Barrett Garages, Inc., with appropriate provisions for such as:

1 - Payments of charges for car parking or storage, plus fees in accordance with the Agreement with Barrett Garages, Inc., such payments to be retroactive to date of commencement of such other u-drive services;

2 - Rendition of reports and examination of books and records by the Controller and/or the Public Utilities Commission of the City and County of San Francisco."

Inasmuch as the answer to "A" immediately hereinabove has been in the negative, it becomes unnecessary to discuss the suggested procedures outlined in "B".

Your concluding interrogation is as follows (page 5):

"C - If it is your Opinion with regard to (A) that the Airport is not being deprived of rightfully earned revenues, please advise how the City through its Public Utilities Commission may justify the use of its property by profit-motivated commercial enterprises without collecting adequate charges and/or fees for such use, particularly in view of Section 2, Part 1, of Airport Rules and Regulations and Rates and Charges which section reads:

'No person shall use the Airport for revenue-producing commercial activities without securing an appropriate permit for such activities from the Public Utilities Commission and paying the rates and charges prescribed for such use.'"

We think that the general discussion heretofore appearing affords answer to your last question. It is true that both Barrett and its competitors may properly be styled "profit-motivated commercial enterprises." However, as we have stated, an attempt upon the part of the Public Utilities Commission, or management of the Airport, to prohibit use of public roads upon the Airport in fulfillment of an order not negotiated or taken upon the Airport would be an undue and illegal interference with the right of private contract.

In expressing the above view, we are mindful of readiness of opportunity for evasion and pretext. We repeat that if such instances come to our knowledge we will recommend the institution of litigation which would be appropriate and which would be in the nature of an action for an injunction. Such injunction would doubtless be of forceful effect, inasmuch as a violator thereof would be guilty of contempt of court. This form of relief against such unlawful invasion upon the concession granted by the Commission would solve the practical problem, in that the City and County of San Francisco possesses no police power upon the Airport but must be guided solely by its Rules and Regulations, which extend no further than to authorize the ejectment of a violator from the Airport premises.

Respectfully submitted,

ADT

DION R. HOLM
City Attorney

To: Mr. Harry D. Ross, Controller

OPINION NO. 267

October 20, 1950

SUBJECT: CASH DEPOSIT IN LIEU OF UNDERTAKING ON APPEAL -- DISPOSITION OF BY COUNTY CLERK: HARRIS, KAPLAN, ET AL. v. NATIONAL UNION OF MARINE COOKS AND STEWARDS, ET AL.

Dear Sir:

I have your request for an opinion as follows:

"I am in receipt of a letter, dated October 3, 1950, from the office of Mr. Gus C. Ringole, an attorney, setting forth a claim to certain funds. A copy of the letter is attached hereto.

"A stop has been placed on the disposition of the sums designated in the letter.

"Please advise me as to our position in this matter."

Mr. Ringole's letter of October 3, 1950, reads:

"The Honorable H. D. Ross
Controller of the City and County of San Francisco
City Hall, San Francisco, California

Dear Sir:

Please be advised that Aaron Sapiro and the undersigned are the attorneys of record for plaintiffs in the action pending in the Superior Court No. 345365 entitled ALEX HARRIS, MARTIN KAPLAN, WILLIAM J. McCOURT, MARTIN ANTONS AND W. D. HANDELSMAN v. NATIONAL UNION OF MARINECOOKS AND STEWARDS, ET AL.

In that action we procured judgment in favor of the plaintiffs and against the defendant, and more particularly a judgment in favor of Alex Harris for $12000 and Martin Kaplan for $15000. $57000 was deposited with the county clerk of the City and County of San Francisco as a bond to stay execution on appeal. The appeal has finally been determined and judgment affirmed.

The said Alex Harris and Martin Kaplan have asked the court to order the money payable to them alone. They are doing this in order to cheat and defraud their attorneys, said Aaron Sapiro and the undersigned, of their fees.

We have a written contract with them by virtue of which contract we own one-third of the amount of money on deposit with the county clerk to protect their several judgments. We advise that the title to the one-third of said money belongs to said Aaron Sapiro and the undersigned, namely the sums of $4000 and $5000 respectively.

Therefore, this is to advise you that the said Aaron Sapiro and the undersigned do hereby make claim to the ownership of one-third of the fund standing in the name of Alex Harris with the county clerk to-wit $4000 and one-third standing in the name of Martin Kaplan to-wit $5000 and we do hereby demand that you pay the said sums to the said Aaron Sapiro and the undersigned and to no other person or persons whomsoever."

OPINION

The $57000 was deposited pursuant to Section 948 of the Code of Civil Procedure, which so far as material, reads:

> ". . . in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, shall be equivalent to filing the undertaking; . . . ."

The money is therefore in the legal custody of the Superior Court and its disposition depends on that court's order.

In SPEAR v. JOHNSON, 111 Minn. 74, 126 N. W. 402, it is said:

> "Our statutes (section 4366, Rev. Laws 1905) provide for a deposit of money in lieu of an appeal bond, but make no provision for the disposition of the money

on the final determination of the appeal. No specific procedure being provided by which the party entitled to the money may demand and receive the same, we must apply the procedure appropriate in analogous cases. In cases where money is deposited with the court to abide the event of an action, the successful party may obtain the same by applying to the court for an order to the clerk directing its payment. 13 Cyc. 1038, and cases cited. The application being made upon notice, the rights of all parties will be protected, and the clerk, custodian of the money, relieved from responsibility. Such should be the procedure in cases like that at bar, where money in lieu of an appeal bond is deposited with the clerk."

In HAMILTON v. SOUTHERN RY. CO., 203 N. C. 468, 166 S. E. 392, 395, col. 1, it was said, affirming an order directing disposition of moneys deposited with the clerk of court in lieu of an appeal.bond:

"The fund was in custodia legis, and the court had the right and power, and it was its duty, to make the order."

See also 4 C. J. S. pp. 1144-5:

"Where money is deposited in lieu of a bond, the successful party may, on notice, obtain the amount due by applying to the court for an order to the clerk directing its payment."

The court's order disposing of the moneys deposited would be a "special order made after final judgment" and hence appealable. (C. C. P., sec. 963) Sixty days from date of entry of the order are allowed for an appeal (Rules on Appeal, Rules 2(a) and 40(g)), after which time, no appeal having been taken, the order is final.

You and the county clerk should therefore await the court's order (Judge Thomas M. Foley tried the cause), and when such order

has been made and has become final, that is, no appeal taken within sixty days, you should comply with it.

Respectfully submitted,

DION R. HOLM
City Attorney

GEB

To: Mr. Harry D. Ross,
Controller

OPINION NO. 268

October 18, 1950

SUBJECT: ANALYSIS OF THE STATE LAW REGULATING LEGISLATIVE REPRESENTATION (STATE LOBBYING CONTROL ACT.)

Dear Sir:

This office is in receipt of a request for an opinion as follows:

> "During the 1950 budget session of the California State Legislature three bills regulating legislative representation were passed and signed by the Governor. The bills were AB 74, 104 and 106. These measures were in addition to legislation adopted during the special legislative session held in December of 1949.
>
> "As you know, the City and County of San Francisco is represented at the Legislature not only by a legislative representative and members of your staff whose duties take them to Sacramento, but by other city officials who are called upon to appear before standing and interim legislative committees.
>
> "I have issued verbal instructions to Donald W. Cleary, the City's representative at Sacramento, to comply with the letter and spirit of all laws designed to regulate legislative representation. However, I feel that an opinion from you on this matter is necessary. Accordingly, I request that you digest all of the legislation adopted pertaining to the above subject for the guidance of every city official or employe whose duties make it incumbent upon him to spend time in Sacramento during legislative sessions or to appear before any legislative committees."

O P I N I O N

In order to answer your request, I have found it necessary to prepare a short analysis of the lobbying laws which became effective July 15, 1950. This law as presently drawn is actually in two parts. The first part deals with the employer, which in this case would be the City and County of San Francisco, and the second part deals with the employee who would be the legislative representative, City official or employee. Each part imposes different duties and obligations.

Section 9900, GOVERNMENT CODE, which is a part of this law, deals exclusively with the definition of terms that are used through-

out the Act. The state, county or city are not included in the definition of the term "person". Under the general rules of interpretation, the state, city or county would be excluded from the effect of the law whenever it referred to "person", unless somewhere a specific reference is made to the state, city or county. I have found no such reference.

Section 9901 requires every person who solicits or receives a contribution to any organization or fund for the purposes hereinafter designated to file a complete, detailed and exact account of such contributions and expenditures.

Sections 9902 and 9903 contain the details as to the manner of reporting these contributions or expenditures.

Section 9904 provides the method for the proper filing of a report and how long the report shall be preserved after it is filed.

Section 9905 refers back to Section 9901 and 9903 and provides to whom these sections shall apply. This section reads as follows:

> "9905. The provisions of Sections 9901 to 9903, inclusive, shall apply to any person, except a political committee, who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, <u>or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid</u>, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California.
>
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California." (Emphasis added.)

You are advised accordingly that so far as the City and County of San Francisco is concerned it does not come within the purview of the Act. The reasons for so advising you are: (1) the word "person" could not be construed to include the City and County of San Francisco; and (2) none of the money raised by the City and County of San Francisco through its various sources is for any of the purposes mentioned in Section 9905.

Section 9906 of the GOVERNMENT CODE deals with the person or individual who is actually engaged for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the legislature or the approval or veto of any legislation by the Governor. Unless the city's Legislative Representative comes under the exceptions to this section, which will

be noted hereafter, it will be necessary that he comply with its requirements. The only exception that could possibly apply to the Legislative Representative is the one, which provides that the sections do not apply "to any public official acting in his official capacity." (See 9906 Gov. Code).

My predecessor previously advised you that the position of Legislative Representative was a full-time position carrying compensation in the City and County service, as defined in §5 of the Charter. However, this opinion contained nothing that would indicate or hold that the Legislative Representative was a public official. Nothing that I have discovered in the course of my research in preparing my present opinion could in any way make him a public official.

Consequently, I advise you that pursuant to §9906 of the GOVERNMENT CODE, the Legislative Representative of the City and County of San Francisco is required to register and file the reports required of him under the sections of the GOVERNMENT CODE relative to persons employed as Legislative Representatives in the Legislature.

City officials or employees whose duties make it incumbent upon them to spend time before the legislature in Sacramento, must be treated in two separate categories.

The City officials, while appearing in their official capacity, are exempt from the operation of any of the provisions of the State Lobbying and Control Act by Section 9906 of the GOVERNMENT CODE. Therefore, any City official whose duties require him to be in Sacramento for the purpose of appearing before the legislature or one of its committees would not be required to register with either the clerk of the Assembly or the Secretary of the Senate, nor will he be required to furnish any detailed report of his expenditures.

City employees, on the other hand, are not officials of the City and County of San Francisco and accordingly do not come under this exception. However, Section 9906 further provides that its conditions need not be met by a <u>person who merely appears before a committee of the legislature in support of or in opposition to legislation</u>. The intention of the legislature in making this exception is clearly to cover City employees who merely appear before a committee in connection with a specific bill. Most of the City employees to whom you have reference in your request would come under this exception. Accordingly, it would not be necessary for them to register or to file the required reports.

If, for some reason, an unusual problem is presented by an employee who is to attend a session of the legislature, the Department Head should contact me in order that I might advise him whether the employee comes within the exception quoted above.

The balance of the Acts referred to deals with the duties of the attaches of the Senate and Assembly.

Respectfully submitted,

DION R. HOLM
City Attorney.

TO: Honorable Elmer E. Robinson
Mayor, City and County of San Francisco

BJW

OPINION 269

OCTOBER 27, 1950

SUBJECT: SUPERINTENDENT OF STREET REPAIR: SUPERINTENDENT OF STREET CLEANING: WHETHER RECLASSIFICATION OF POSITIONS RESULTED FROM AMENDING TITLES AND DUTIES OF SUPERVISOR OF STREET REPAIR AND SUPERVISOR OF STREET CLEANING: DETERMINATION OF RECLASSIFICATION AS AFFECTING POWER OF CIVIL SERVICE COMMISSION TO GRANT STATUS IN NEW CLASSIFICATION. (SECOND REQUEST)

Dear Sir:

I am in receipt of your request for an opinion as follows:

REQUEST

"We acknowledge receipt of your opinion No. 238 dated August 29, 1950 titled 'Superintendent of Street Repair; Superintendent of Street Cleaning; Whether reclassification of positions resulted from amending titles and duties of Supervisors of Street Repair and Supervisor of Street Cleaning.'

"I am directed by the Commission to ask your advice concerning the following question for its enlightenment in this matter:

"If the Commission now determines that its action did in fact constitute a reclassification, has the Commission the power to grant status in the reclassified positions to the present occupants without examination?"

OPINION

Section 141 of the Charter of the City and County of San Francisco, which defines the powers and duties of the Civil Service Commission, provides that the Commission shall classify and reclassify civil service positions. In connection with such declaration of powers the section proclaims that the "Civil Service Commission shall be the judge of such classification."

While such is a plenary grant of power to the Commission, in other portions of the same section it is provided, with equal force and effect, that:

> "No person shall hold a position outside of the classification to which he has been appointed . . . ."

Under the just-noted provision of Section 141, any determination by the Commission that its action (as noted in my opinion No. 238, dated August 29, 1950) constituted a reclassification would prevent the Commission from granting to the employees in question any civil service status in the new classification. Such status could be acquired only after examination.

Accordingly, you are advised that the question asked by you must be answered in the negative.

Respectfully submitted,

DION R. HOLM
City Attorney

WFB

To: William L. Henderson
Secretary and Personnel Director
Civil Service Commission

Opinion No. 270
October 30, 1950

SUBJECT: SIGNS ON BILLBOARDS IN SECOND RESIDENTIAL DISTRICT.

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

"At the northwest corner of California and Jones, there is a three-story apartment-hotel building. For some years a dining room has been in operation within the building, having no separate outside entrance. The property is classified as Second Residential by the zoning ordinance, which permits hotels. An inside dining room has always been considered to be a 'usual accessory' to such use, even though open to the general public, inasmuch as it is supposed to exist primarily for the convenience of tenants.

"However, it has always been our interpretation that any such alteration in the external residential appearance of such a building as would be produced by the placement of an outside sign, advertising the dining room, would be unlawful in that such a sign would -

"(a) not be necessary for the convenience of residents of the building, and therefore not an accessory to a residential hotel

"(b) in itself constitutes a commercial use of property and

"(c) renders the legal status of the dining room itself doubtful, by doing away altogether with the tacit assumption theretofore made that such dining room exists primarily as an incident to the hotel operation, i.e. primarily for residents of the building.

"We have consequently withheld approval of an application (No. 131013) filed Sept. 12, 1950 for a permit to erect upon the face of the above mentioned building an electric sign 45 feet long with letters 12" high, to read 'Hillcrest Dining Room.'

"Applicant has requested us to seek your opinion as to whether in so doing we have correctly interpreted the City Planning Code.

"Your assistance in this matter will be appreciated, particularly if you can give us some general guidance on the whole question of signs on permitted uses in residential areas."

O P I N I O N

You are asking whether it is proper for the City Planning Commission or the Director thereof to approve a permit to erect upon a hotel located in a second residential district an electric sign 45 feet long with letters 12" high reading "Hillcrest Dining Room."

Under the City Planning Code, as you have indicated, hotels are permitted in second residential districts.

In the past years, my predecessor, John J. O'Toole, has had several occasions to write opinions for your board, in which he has undertaken to analyze the provisions of the City Planning Code and has concluded that neither business advertising signs nor billboards can be erected in either first or second residential districts, whether upon buildings or vacant lots therein situated. One such opinion was rendered on April 2, 1937, No. 1002; another on March 16, 1944, No. 3563; and still another on July 12, 1944, No. 3590. I have given study to all of these opinions and am in full accord with the viewpoints therein expressed. Inasmuch as these opinions were rendered to your department, I am not forwarding copies of all of them herewith. However, I am attaching a copy of the opinion of April 2, 1937 because of the fact that I believe it succinctly sets forth a comparable problem to that involved in this current request of yours, and analyzes the provisions of the City Planning Ordinance then and now in effect and applicable.

In an opinion rendered on January 25, 1933, my predecessor concluded that, under the circumstances there involved, the City Planning Commission should not issue a permit for an electric display sign in a second residential district. I am in full accord with the views expressed in that opinion and feel that the same is quite applicable to the facts here considered. For your information, I am attaching a copy of this opinion.

Under the provisions of our City Planning Code, businesses as such are intended to be excluded from first and second residential districts; hence, any type of a sign which could be construed to be of a business nature would not be permissible in a first or second residential district, unless it would possibly be with reference to the exception permitted in connection with "the office of a musician, physician or dentist or other person authorized by law to practice medicine, when situated in the same dwelling used by such person as his or her place of residence." And, as has already been pointed out, neither business advertising nor billboards as such can be erected in either first or second residential districts, whether upon buildings or vacant lots therein situated.

You are therefore advised that you have correctly interpreted

the City Planning Code in withholding approval of the application referred to for a permit to erect upon the face of a hotel located in a second residential district an electric sign 45 feet long with letters 12" high to advertise a "Hillcrest Dining Room."

Respectfully submitted,

NSW

DION R. HOLM,
City Attorney.

To: Mr. Paul Opperman
Director of Planning
Department of City Planning
100 Larkin Street
San Francisco 2

OPINION OF
CITY ATTORNEY

Opinion No. 657
January 25, 1933

SUBJECT: ELECTRIC SIGN UPON NON-CONFORMING USE BUILDING.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

"Application has been made to the Central Permit Bureau, Department of Public Works, for a permit to erect an electric display sign on top of an existing building at 2500 Market Street, and same has been referred to this office for approval as to compliance with the Zoning Ordinance.

"The building upon which it is desired to erect this sign is in a Second Residential District, while the use of the building is a non-conforming one. This proposed sign would approximately be 19 feet high and 27 feet wide.

"QUERY: Should the City Planning Commission approve an application for a permit for the erection of an electric display sign in a Second Residential District?"

O P I N I O N

The construction of an electric sign of the size indicated in your request upon a building would be considered an enlargement of the building. Section 9 of Ordinance No. 5464 provides that no non-conforming use shall be enlarged at the expense of a conforming use. In the instant case it appears that the building involved is a non-conforming use.

Such a structure, under the provisions of the aforesaid ordinance, and under the circumstances involved herein, is not permitted in a second residential district.

Under the circumstances, therefore, it is my opinion that the City Planning Commission should not allow the permit without a rezoning.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney.

To:
City Planning Commission,
City Hall

#3

OPINION OF
CITY ATTORNEY

Opinion No. 1002
April 2, 1937

SUBJECT: CAN BILLBOARDS BE ERECTED IN FIRST AND SECOND RESIDENTIAL DISTRICTS?

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

> "Under the zoning ordinance has the Commission the right to approve applications for permits to erect advertising signs or billboards in either the First or Second Residential Districts?"

O P I N I O N

The zoning ordinance in question is Ordinance No. 5464. It divides the City and County of San Francisco into six districts for the purpose of regulating and establishing the location of trades and industries, businesses, dwellings, etc. Two of those districts are known as the First and Second Residential Districts respectively. What use may be made of property in those two districts is specifically provided in the ordinance. In neither is the erection of advertising signs or billboards mentioned. Does this ordinance mean to regulate and govern the use that may be made of vacant lots? This is the only query here presented. The ordinance in part reads as follows:

> "No building or premises shall be erected or used for any purpose other than a purpose permitted in the use district in which such building or premises are located."

If the word "premises" refers to vacant lots, it is clear that the erection of advertising signs or billboards is not permitted in First or Second Residential Districts, as such uses are not among those specifically allowed in those districts. From the underscored portion of the ordinance above quoted from, it is evident that the ordinance intends to regulate and govern the use that may be made of vacant lots in the various districts, as well as the erection and use of buildings. This same view was taken of similar language in a zoning ordinance of New York, discussed in the case of MONUMENT GARAGE CORPORATION v. LEVY, 194 N.E. 849, where the court said:

> "The argument is advanced, however, that the ordinance does not apply to vacant land. The word 'premises' has a broad significance. We may not disregard it. The intent

that the zoning resolution should apply to every use, whether of buildings or land, in a 'use district,' clearly appears from the express terms of the resolution, and is instinct in many of its separate clauses. Here there is no room for construction. The ordinance must be applied in accordance with its letter and spirit. The use of the applicant's land within the residence district and abutting on Fifty-Ninth street for parking space is illegal, and permit for lowering the curb on Fifty-Ninth street was properly refused."

You are, therefore, advised that the City Planning Commission does not possess the right to approve applications for permits to erect advertising signs or billboards in either the First or Second Residential Districts, whether it be upon buildings to be or already erected or upon vacant lots.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney.

To: City Planning Commission,
City Hall.

Opinion No. 271

October 30, 1950

SUBJECT: TERMINATION OF WAR WITH RESPECT TO SECTION 36.1 OF THE CHARTER DEALING WITH EXTRA WORK OF FIREMEN ON DAYS OFF.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"The fire department is faced with a manpower shortage similar to that experienced during World War II and at that time we obtained relief by permitting members to work on their days off a procedure which was legalized by the adoption of a Charter Amendment designated as Section 36.1.

"The last paragraph of this section reads:
(h) 'The provisions of this section shall continue in force for a period six (6) months after the termination of the present war between the United States and the Axis powers.'.

"In correspondence with Mr. Wm. L. Henderson, Personnel Director and Secretary of the Civil Service Commission suggesting recourse to this Section as a relief from present conditions, he takes the position 'that Section 36.1 of the Charter is no longer in force and effect since the final paragraph of that section specifies specifically that the section shall cease to be operative six months after the termination of the war with the Axis powers'.

"In the absence of a peace treaty with any of the Axis powers, I believe, there is some doubt as to the 'termination of the war' and I am respectfully requesting your opinion whether or not the present status would permit us to apply Section 36.1 of the Charter of the City and County of San Francisco."

O P I N I O N

On April 10, 1947, this office rendered an opinion to the Civil Service Commission covering Section 145 of the Charter and dealing with the question of when World War II terminated. This opinion is found in the 1947 City Attorney Opinion Book and numbered 3936. In the final paragraph thereof, it is stated:

"Hence you are advised that service beyond December 31, 1946, the date on which the President has declared the

cessation of hostilities, cannot be construed as service 'in time of war' under the provisions of Section 145 of the Charter."

This opinion is directly in point.

In the instant matter, I advise you, under the facts presented, that the existing war between the United States and the Axis powers terminated on December 31, 1946. Therefore, Section 36.1 ceased to be effective on June 30, 1947.

Respectfully submitted,

DION R. HOLM
City Attorney

CWD

To: Mr. Edward P. Walsh
Chief of Department
Fire Department

Opinion No. 272
November 2, 1950

SUBJECT: OATH OF LOYALTY PRESCRIBED BY CHAPTER 8, DIVISION 4, PART 1 OF THE GOVERNMENT CODE A PREREQUISITE TO SERVICE OF CITY EMPLOYEE AFTER NOVEMBER 2, 1950. DUTY OF APPOINTING OFFICER.

Dear Sir:

You have requested opinion of this office as follows:

"There apparently will be some employees of the city and county, who for reasons of their own, will refuse to subscribe to the Oath of Loyalty on or before November 2, 1950 as required under Section 2 of the newly enacted Chapter 8, Division 4, Title 1 of the Government Code.

"In this inquiry we are not referring to employees on authorized leaves of absence as of November 2, 1950 who under the law are allowed thirty days following their return to duty in which to subscribe to the oath.

"The act states that the purpose of the legislation is to require immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of the overthrow of the government by force or violence. The assurance demanded from public employees by the legislation is that such employees shall subscribe to the oath. In failing or refusing to subscribe to the oath the public employee has failed or refused to give this assurance required of him.

"In accordance with the provisions of Paragraph 3107 of the Act, approval of compensations for such persons who refuse or fail to subscribe to the required oath will be withheld. It is probable or possible that some of these individuals will elect to continue the performance of their duties after November 2, even though approval of their compensation will be withheld.

"Will you kindly advise us as follows:

"1. Under such circumstances, may the appointing officer permit such an employee to continue in the performance of his duties after November 2 even though approval of payment of compensation will be withheld.

"2. Do such circumstances impose upon the appointing officer the duty to take such steps as in his judgment may be justified and warranted to separate such an employee as of November 2 from his municipal employment.

"3. Must such steps be taken under the provisions of section 154 of the charter, or is there authority implicit in the State legislation for summary action independent of charter provisions."

O P I N I O N

1. The answer to your inquiry numbered 1 is in the negative. The appointing officer should not permit such employee to continue in the performance of duties after November 2, 1950.

2. In response to your inquiry numbered 2, it is my opinion that such circumstances impose upon the appointing officer the duty to utilize the procedure provided by law to separate such employee from his municipal employment as of the close of November 2, 1950.

3. In response to your inquiry numbered 3, the procedure of section 154 of the charter should be utilized in all instances where such procedure limits the power of the appointing officer in the premises.

You are aware of the fact that yesterday applications of five city employees for a preliminary injunction in this matter were heard before Judge Molkenbuhr in our Superior Court. Like applications of two teachers in the San Francisco School Department, of certain State College teachers and of certain part-time workers at the University of California were also heard. Judge Molkenbuhr denied the applications after a lengthy hearing and rendered an opinion in support of his decision.

In advising you respecting the foregoing inquiries, I rely on the opinion of Judge Molkenbuhr, as well as my considered construction of the subject statute and the law applicable thereto. A copy of His Honor's opinion will be provided you shortly for your further guidance.

You make certain other inquiries not requiring immediate response as to which I shall advise you shortly by separate opinion.

Respectfully submitted,

DION R. HOLM,
City Attorney.

WP

To: Mr. William L. Henderson
Personnel Director and Secretary
Civil Service Commission

Opinion No. 273

November 8, 1950

SUBJECT: RE TIME FOR APPEALS TO BOARD OF PERMIT APPEALS

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

"Last March one Arthur J. Fidgeon applied to the Chief of Police for renewal of a permit to carry a pistol. The request was denied. On last September 18, he appealed to the Police Commission in an effort to have the Chief of Police overruled in the matter. The Police Commission concurred with the Chief of Police in refusing the request for a renewal.

"Now Mr. Fidgeon has within ten days of this latter refusal appealed to this Board to overrule the Police Commission. Can the Board of Permit Appeals hear the case now or do we have to disregard the appeal because it was not made within ten days after the refusal by the Chief of Police?"

OPINION

The Charter of the City and County of San Francisco gives to the Chief of Police and not to the Police Commission the authority to issue and revoke permits. Section 35.6 reads in part as follows:

"The chief of police may refuse to issue any permit that is subject to police department investigation and issuance, if it shall appear that the character of the business or the applicant requesting such permit does not warrant the issuance thereof, or he may revoke any such permit as soon as it shall appear that the business or calling of the person to whom it was granted is conducted in a disorderly or improper manner."

See also, GRIEF v. DULLEA, 66 Cal. App. (2d) 986.

Section 8, Part III of the Municipal Code reads in part as follows:

> "Method of Appeal to the Board of Permit Appeals. Appeals to the Board of Permit Appeals shall be taken ten (10) days from the making or entry of the order or decision from which the appeal is taken by filing a notice of appeal with the Board of Permit Appeals and paying to said Board at such time a filing fee of Five ($5.00) Dollars."

The order or decision from which Mr. Fidgeon now appeals is the decision of one duly authorized to make it, to wit, the Chief of Police, and not the Police Commission.

Section 8, Part III of the Municipal Code aforesaid is a mandatory provision and the time within which it was necessary for Mr. Fidgeon to file with your Board dated from the denial of his application by the Chief of Police in March of 1950.

It is the opinion of this office, therefore, that Mr. Fidgeon's appeal not being a timely one your Board is without jurisdiction to now consider his case.

You are referred to two opinions of this office heretofore rendered, to wit, Opinion No. 3435 dated November 10, 1942, and Opinion No. 3763 dated March 8, 1946, which are in agreement with our present holding.

Respectfully submitted,

DION R. HOLM
City Attorney

DJK

To: Mr. Ernest L. West,
President,
Board of Permit Appeals

OPINION 274

November 10, 1950

SUBJECT: HOLIDAY AND PREMIUM PAY RATES FOR CLASSES OF EMPLOYMENT WHICH EXERCISE SUPERVISION OVER CLASSES PAID UNDER CHARTER SECTION 151.3; HOLIDAY AND PREMIUM PAY RATES FOR CLASSES OF EMPLOYMENT WHICH ARE RELATED TO CLASSES PAID UNDER CHARTER SECTION 151.3

Dear Sir:

I am in receipt of your request for an opinion as follows:

REQUEST

"We desire your advice in respect to the following matter:

"Rates of pay for crafts, compensations for which are subject to the provisions of section 151.3 of the charter, are fixed in ordinance 6157 which was approved on July 28, 1950. These are the rates of pay set forth in the collective bargaining agreements and are specified in sections 8 to 8.47 of the said ordinance. In the same sections of the ordinance we specify the work schedules which are compensated at straight time, penalty pay for work outside the regular work schedules or for overtime worked, and for holidays worked as set forth in the respective contracts, and vacation provisions, paid holidays, and other premium payments, etc., as set forth in the respective contracts.

"In section 9 of the same ordinance we specify rates of pay for Sub-foreman, Foreman and General Foreman who exercise supervision over the work of the crafts whose compensations are fixed pursuant to section 151.3 of the charter and specified in section 8 to 8.47 of the ordinance. Supervisory personnel are not included in collective bargaining agreements, and we do not so certify, but the rates fixed reflect traditional differentials for such supervisory personnel over and above the craft rates.

"In section 10 of the ordinance we specify rates of pay for classifications, the duties of which, and

the required training for which are closely related to the crafts specified in sections 8 to 8.47 of the ordinance. As in the case of the foremen enumerated in section 9 of the ordinance, rates for these related classes are not included in any collective bargaining agreements. An example of this situation is the case of Blacksmith Finisher, which is a classification of employment peculiar to the municipal service and not found in private employment and therefore not included in the collective bargaining agreements, but it is closely related to Blacksmiths. Rates and working conditions for Blacksmiths are set forth in section 8.33 of the ordinance and the rate for Blacksmith Finisher is set forth in section 10. Another example is our classification of Asphalt Worker, which is not duplicated in private employment nor included in any collective bargaining agreement, and is closely related to Asphalt Finisher, the rates for which are fixed in collective bargaining agreements.

"Work schedules, overtime and holiday premium rates, etc., for the classifications for which rates are fixed in sections 9 and 10 of the ordinance 6157 are governed by the provisions of the annual salary ordinance.

"This situation has resulted in inconsistencies which are causing complaints from the employees concerned. For instance, Blacksmiths are paid for six unworked holidays in accordance with collective bargaining agreements (section 8.33 of ordinance 6157) but rates are not specified in the collective bargaining agreement for Blacksmith Finisher, and as a consequence, we have no authority to pay these employees for unworked holidays. (Section 150 of the Charter, last paragraph.)

"Another example follows:

"We are compensating Foreman and Sub-foreman Laborers at time and one-half the regular rate of pay for overtime worked, including work on Saturdays and Sundays, as provided in section 2 of the annual salary ordinance, whereas, Laborers whose compensations are fixed under Section 151.3 of the Charter receive double time for such overtime and Saturday and Sunday work

as provided in the collective bargaining agreement. (Section 8.28 of ordinance 6157). This is because the collective bargaining agreement fixes the rate for Laborers but does not specify rates for Foreman and Sub-Foreman of Laborers.

"Still another illustration is the case of the Electric Railway Shop Mechanic (Class E200) and Sub-foreman Electric Railway Shop Mechanic (Class E206). Rates of pay are not specified in the collective bargaining agreements for these classifications and therefore the rate for such employees in the municipal service are fixed in section 10 and 9 respectively of ordinance 6157. Rates of pay are specified in a collective bargaining agreement covering work deemed by the Civil Service Commission to be similar for our classes Senior Electric Railway Shop Mechanic (Class E202) and Foreman Electric Railway Shop Mechanic (Class E208). Accordingly, the rates of pay for these latter two classes are fixed in section 8.25 of ordinance 6157 pursuant to the collective bargaining agreement. The result is that Electric Railway Shop Mechanic and Sub-Foreman Electric Railway Shop Mechanic receive time and one-half for work on Sundays as provided in the annual salary ordinance, whereas, Senior Electric Railway Shop Mechanic and Foreman Electric Railway Shop Mechanic receive double time for Sunday work pursuant to the provisions of section 8.25 of ordinance 6157.

"We agree that inconsistences have resulted because of these conditions, but we see no authority for wage payments to these employees other than as outlined herein, which payments have been made pursuant to the appropriate ordinance of the Board of Supervisors. The Commission desires your advice on these matters. Will you therefore advise us as follows:

"1. Do the general contract provisions (such as premium pay and penalty pay rates, work schedule provisions, paid and unpaid holidays either worked or unworked) apply to supervisory or related classifications even though the rates of pay for such supervisory or related classifications are

not included in the related craft agreements, nor are such classifications mentioned in the agreements?

"2. Do we have authority, under the charter or elsewhere, to pay employees whose compensations are fixed in sections 9 and 10 of ordinance 6157 in any manner except as set forth in the appropriate salary ordinance provisions?"

OPINION

Section 151.3 of the charter provides in part as follows:

". . .whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the city and county service . . . "

In ADAMS v. WOLFF, 84 Cal.App.(2d) 435, the court held that the holiday pay and premium pay rates set up in the collective bargaining agreement than under consideration were within the purview of, and included within, the "rate of pay" concept expressed in Section 151.3, as noted hereinabove. In ADAMS v. CITY AND COUNTY OF SAN FRANCISCO, 94 Cal.App.(2d) 586, the same court restated and reaffirmed these principles; and, further, held that 'vacation' pay was similarly included within the "rate of pay" concept set up in Section 151.3. In both of those cases, the Supreme Court denied a hearing.

The purport of section 151.3, as illustrated in the two Adam cases, supra, is to adopt for the benefit of city employees in the respective groups and crafts the pay rates of collective bargaining agreements covering such groups and crafts, providing (as qualified by the section) that such rates are "recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco."

As disclosed in your request for opinion, the 'supervisory' and 'related' classifications whose rates of pay are set up in sections 9 and 10 of Ordinance No. 6157 are not included in any collective bargaining agreement; and, hence, no 'rate of pay' for such employees is "recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco". In view of such factor, the employees covered in those classifications (secs. 9 and 10 of Ordinance No. 6157) do not come within the scope of the holding in the first Adams case, supra. That is, their rate of pay is not partially measured by including therein the holiday and premium pay schedules set up in the collective bargaining agreements.

Since such is so, the holiday and premium pay to which they are entitled must be that afforded under the Annual Salary Ordinance. Such holiday and premium pay privileges must necessarily be traceable to that ordinance, or no right to such payments can otherwise accrue to employees in the classifications now under consideration.

In accordance with the foregoing, you are advised that each of the two questions asked by you is answered in the negative.

Respectfully submitted,

WFB

DION R. HOLM
City Attorney

William L. Henderson,
Secretary, Civil Service Commission

Opinion No. 275

November 13, 1950

SUBJECT: EFFECTIVE DATE OF ORDINANCE PROVIDING FOR CALCULATION OF RETIREMENT BENEFITS WHEN NOT PURELY ADMINISTRATIVE.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Ordinance No. 6280 (Series of 1939) was recently passed by the Supervisors and signed by the Mayor. It affects the calculation of retirement benefits in this office and consequently we are interested in its effective date.
>
> "Because of a question as to whether it becomes effective ten days or thirty days after October 18, I shall appreciate it if you will advise us as to which is the correct effective date to be taken. We are anxious to make the necessary adjustments in allowances affected by the amendment, for our November roll, which normally closes on November 22nd. Anything youcan do to clear the matter sufficiently long before that time, to permit the adjustment of allowances on that roll, will be appreciated."

O P I N I O N

Ordinance No. 6280 provides for "adjustments in retirement allowances for certain persons previously retired under the provisions of Section 165.2 of the charter and designating the provisions of the ordinance, Section 260, Article 3, Part 1, of the San Francisco Municipal Code."

Section 16 of the charter provides in part as follows:

> "No ordinance which is subject to the referendum provisions of this charter shall become effective until 30 days after its passage. . . Other ordinances shall not become effective until ten days after their passage unless enacted by a three-fourth's vote of all the members of the Board as an emergency measure as defined in this section. . . "

Section 179 of the charter states the kind of ordinances which are not subject to referendum. The only exception which might be considered applicable to the Ordinance in question is "ordinances relative to purely administrative matters." However, Ordinance 6280 provides for a change in the existing law relative to the amount of pension of the persons designated. The Ordinance therefore is legislative in character and does not relate to "purely administrative matters" (See: Burdick vs. City of San Diego 29 CA (2) 565). The ordinance is subject to referendum and is governed accordingly by the thirty day provision of Section 16 of the charter.

It is my opinion therefore that Ordinance 6280 becomes effective thirty days after the approval of the Mayor.

Respectfully submitted,

DION R. HOLM
City Attorney

TMO

To: Mr. Ralph R. Nelson
Consulting Actuary
Retirement Board
City & County of San Francisco

Opinion No. 276

November 13, 1950

SUBJECT: PRORATION OF CHARGES FOR RAMP (APRON SPACE) - DOMESTIC TERMINAL BUILDING AT AIRPORT - TWA LEASE RE RAMP.

Dear Sir:

This is in response to your request for an opinion on the question of whether Trans World Airlines, Inc., a corporation, formerly known as Transcontinental & Western Air, Inc., is obligated to pay a charge for ramp space and other paved areas for the loading and unloading of passengers, mail and express, in addition to various charges specifically provided for in its lease.

O P I N I O N

Under a document designated as a lease (and hereinafter referred to as "the lease"), dated October 1, 1942, in which Transcontinental & Western Air, Inc. (hereinafter referred to as "TWA") is named as the lessee, and in which the City and County of San Francisco is named as the lessor, this airline corporation occupies space at the Airport on certain described land, inclusive of Hangar No. 4. A flat rent of $2,404.00 per annum is provided for in the use of the hangar space, and $1,026.00 is provided for as rental for adjoining shop space. (Vide, Section 1, page 2.)

The rentals just specified are, under the terms of Section 1 of the lease, subject to adjustment upward or downward by mutual agreement at the end of every five-year period. It is further provided that the party desirous of adjustment shall give written notice not less than ninety days prior to expiration of the particular five-year period and, if agreement is not reached, either party has the option of cancellation, but only insofar as the lease extends to the hangar and adjoining shop space.

Under Section 2 of the lease, TWA occupies floor space in the Administration Building at a specified rental per square foot.

Since June of 1949, TWA has been billed by the Airport Department for certain charges in connection with the use of the ramp. In substance, TWA asserts that the provisions of the lease preclude the imposition of such charges throughout the remainder of the period of the lease, which extends for 20 years from October 1, 1942. If such contention be looked upon with favor by the City, the deplorable result ensues that TWA possesses an advantage not

possessed by any competing airline, in that it is enabled to utilize the ramp or apron space without any charge, while competing lines are obligated to pay, and are paying, proportionate charges for the use of this area.

The foundation of the right of TWA to utilize runways, aprons, and other facilities at the Airport, is in Section 3 of the lease, reading as follows:

> "3. Lessor further demises and lets unto Lessee the use, in common with others authorized so to do, and on the <u>same terms and conditions as apply to others</u>, of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings, and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and contractors, patrons, and invitees, which use, without limiting the generality thereof, shall include all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport . . ." (Emphasis ours)

TWA maintains that, notwithstanding this clause, and particularly the portion underscored above, it is entitled to the use of the runways, aprons, and the other specified facilities without payment of any additional rental or charge.

With reference to the words we have underscored above, TWA maintains that the equivalence of "terms and conditions" as between the named lessee, TWA, and "others", means only terms and conditions as to operations and is not inclusive of rental charges.

As a ground for that position, TWA calls attention to but the two items of rental set forth in Section 1 -- $2,404.00 per annum for Hangar No. 4 and $1,026.00 per annum for adjoining shop space. It is argued by TWA that the financial obligations so specified necessarily comprehend the total amount of money TWA is to pay (exclusive of the charge for the area occupied in the Terminal Building).

In fortification of this argument, TWA calls attention to Section 13 of the lease, reading as follows:

> "13. Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor, directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons and invitees, as provided in this lease and agreement."

The phrase from Section 3, and underscored above -- "on the same terms and conditions as apply to others" -- is, in our opinion, just as effective in an imposition of charges for these facilities as if such charges were set forth in the lease in precise terms of dollars and cents. This is true because the general schedule of charges applicable to all is obviously the intended governing factor. In Part VIII of Section 1 of the present Schedule of Rates and Charges at the San Francisco Airport, there is a charge for joint use of ramp space upon a pro rata basis.

There is another provision of the lease, wherein there is repetition in the imposition of the standard charges imposed on others for the use by TWA of the apron. Subdivision 4 of Section 3 provides, as among included uses, on page 5:

> "the landing, taking off, parking, loading and unloading of Lessee's aircraft . . . <u>at the same rates as are charged by Lessor to other air transport operators</u>." (Emphasis ours)

The presence of the portion of the lease just quoted appears to demonstrate conclusively that there was no intention to provide in favor of TWA for free use of ramp space.

We hold, therefore, that the lease calls for rentals upon the following uses: (1) the hangar space; (2) the adjoining shop area; (3) space in the Administration Building; and (4) the use of the various facilities either generally described, or named, in Section 3, including the apron.

We consider of no merit the contention that the phrase "same terms and conditions as apply to others" (in Section 3) extends only to working or operating conditions. We find that the

quoted phrase has been consistently interpreted by the courts as inclusive of every term in the related agreement, or agreements.

Words and Phrases (Perm. Ed.)
Vol. 41, p. 399.

This holding also is made in cases concerned particularly with leases.

Ibid. (1949 Supp.) p. 103.

We further call attention to a well-recognized rule in the field of interpretation. This is that the practical and actual construction adopted by the parties in carrying out the terms of the contract is strongly indicative of the true meaning.

It has been said, and we think it to be a well-sustained principle of law, that "a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the Court." (Woodbine v. Van Horn (1946), 29 Cal. (2d) 95, 104; see also the cases cited in this decision and Civil Code, Section 3535.)

This doctrine of law is here particularly applicable, in that TWA has paid, and continues to pay, its proportion of "water facilities", although the designation of "water facilities" appears among the items specified in Section 3, quoted above.

In the mention of "water facilities", we are mindful that, under the concluding portion of Section 4, the installation of water facilities is at the expense of the lessor. However, this does not pertain to the expense of maintenance. This latter form of expense has been and is recognized by TWA as its obligation. Provision for payment for the use of water facilities is included in paragraph 3 (above) along with mention of aprons and other facilities. Acquiescence in payment for water facilities accomplishes a practical construction and interpretation by TWA not consistent with its denial of obligation to pay for use of the apron.

Further, we are informed that TWA pays its share of the expense of operation of the Public Address System at the Airport, which again demonstrates, through practical construction, that TWA is not to be furnished, free of charge, any of the facilities mentioned in general or specifically set forth in Section 3 (above).

You are therefore advised that in my opinion TWA is obligated to pay its proportionate charge together with other air

transport operators for the use of the ramp and apron space and other facilities in accordance with the schedules of the rates and charges of the Airport.

Respectfully submitted,

DION R. HOLM
City Attorney

ADT

To: Mr. J. H. Turner,
Manager of Utilities

Opinion No. 277

November 13, 1950

SUBJECT: ANNIVERSARY OF PERMANENT EMPLOYMENT IN THE CASE OF EMPLOYEE CHANGING CLASSIFICATION. (ARNELLE FRATIS)

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Miss Arnelle Fratis was first employed by the Public Utilities Commission, General Office, on November 22, 1948, as a B-408, General Clerk-Stenographer. Miss Fratis was employed by the Department of Public Health from September 14, 1948 through November 21, 1948, as a B-512, General Clerk-Typist. In the adoption of the 1949-1950 budget the date of employment for the purpose of fixing the anniversary date to determine when she would receive her first increment in the salary paid was shown by the Civil Service Commission as October 1, 1948, and the sum appropriated was sufficient to increase her salary $25.00 on October 1, 1949. This increase was granted and the payrolls were approved by the Civil Service Commission up to and including the payroll period ending September 30, 1950.
>
> "The Public Utilities Commission, in accordance with the anniversary date set by the Civil Service Commission, increased the compensation of Miss Fratis by $15.00, effective October 1, 1950, representing the second increment. Upon receipt by the Civil Service Commission of the payroll ending October 15, 1950, we were verbally instructed by Mr. Matt Brady of the Civil Service Commission staff that this latter increment was not due and payable to Miss Fratis until December 1, 1950 (the anniversary date of her employment with the Public Utilities Commission), and that an error had been made in granting the increase of $25.00 for the months of October and November, 1949.
>
> "A demand has been made upon the Public Utilities Commission to recover $50.00 which it is claimed is an overpayment.
>
> "Your opinion is respectfully requested as to whether the service of Miss Fratis with the Department of

Public Health as a General Clerk-Typist should not be taken into consideration in arriving at the anniversary date of her employment for the purpose of granting an annual increment in salary paid as provided in Section 6 of the Salary Standardization Ordinance."

O P I N I O N

A review of the personnel history record of Miss Fratis discloses that she was certified to the position of B-512, General Clerk-Typist in the Department of Public Health on August 5, 1948, and was granted permission by the Civil Service Commission to report at a later date, and was finally verified in that position on September 15, 1948. She occupied this position for a period of two (2) months when she left the position and assumed the position of B-408, General Clerk-Stenographer with the Public Utilities Commission on November 22, 1948.

During the two months employment with the Health Department, Miss Fratis did not complete even her probationary period of employment, and thus, in this position did not have permanent employment status. The first permanent employment in Civil Service that Miss Fratis held was that of B-408, General Clerk-Stenographer with the Public Utilities Commission. The positions of B-512, General Clerk-Typist and B-408, General Clerk Stenographer are different positions, of different classification, and as is disclosed by the facts in this particular case, in different departments.

Miss Fratis' situation, in my opinion, is governed by Section 6 of the Salary Standardization Ordinance of the year 1949-50, and Section 1.4 of the Annual Salary Ordinance for the year 1949-50. Section 6 deals with the subject of seniority increments and provides that they "shall become due and payable on the first of the month following the anniversary of permanent employment in the class. . ." The applicable portion of Section 1.4 of Annual Salary Ordinance provides: "Salary adjustments based on years of service as provided in the schedules of compensation shall be effective and due on the first of the month following the anniversary of the date of permanent appointment of the employee to his current position . . ."

The only permanent employment held by Miss Fratis is her current position, that of B-408, General Clerk-Stenographer in the Public Utilities Commission, in which position she completed her probationary period. Miss Fratis having commenced her employment in this position on November 22, 1948, her anniversary date for purposes of seniority increments would be the first of the month following the anniversary, which would be December 1, 1949.

Section 2 of the Salary Standardization Ordinance is not applicable as is readily disclosed by the factual situation of Miss Fratis' case.

It is regrettable, but, in my opinion, due to a mistake in the keeping of the records, Miss Fratis has been overpaid in the sum of $50.00, and no consideration of her prior employment in the Health Department may be given in arriving at the anniversary date of her employment as a B-408, General Clerk-Stenographer in the Public Utilities Commission.

Respectfully submitted,

DION R. HOLM
City Attorney

JGMcB

To: Mr. James H. Turner,
Manager of Utilities.

cc: Mr. Paul J. Fanning;
Mr. G.S. Warren;
Mr. Harry D. Ross, Controller

OPINION No. 278

November 13, 1950

SUBJECT: STATUS OF GEORGE E. HARRISON AND WILLIAM THIELMEYER IN RETIREMENT SYSTEM - FIRE BOATS

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

"The Board has directed that a request be made for your opinion as to the status under the Retirement System of George E. Harrison, Pilot, and William Thielmeyer, Chief Engineer, both being employed on the Fire Boat in the Fire Department. Enclosed, about the question, is a letter dated August 21, 1950, from Mr. A. B. Crowley, member of the Retirement Board.

"This office considered that Mr. Harrison became a member of the San Francisco City Employees' Retirement System, as it then existed, on October 2, 1923, his appointment as a Pilot having been made on April 2, 1923. Mr. Thielmeyer was considered as becoming a member of that retirement system on February 1, 1931, his appointment having been made in August, 1930.

"The San Francisco City Employees' Retirement System was created by ordinance, effective April 1, 1922, and in accordance with Article XVII of the Charter then in effect. This System subsequently was succeeded by the present San Francisco City and County Employees' Retirement System, effective January 8, 1932.

"Mr. Harrison and Mr. Thielmeyer now claim that they properly should have been considered as members of the Firemen's Relief Fund as it existed at the time of their appointment under Article IX, Chapter VII of the Charter then in effect. This Firemen's Relief Fund was succeeded by the present San Francisco City and County Employees' Retirement System and members of the Fund became members of that retirement system in accordance with Section 169 of the Charter, effective January 8, 1932.

"Various changes in memberships under the Retirement System have been made since the so-called new Charter became effective January 8, 1932, but if the retirement status of Mr. Harrison and Mr. Thielmeyer is determined as of the original appointment, I believe the subsequent changes under the Retirement System can readily be applied to them.

"Specifically, your opinion is requested as to whether

Mr. Harrison and Mr. Thielmeyer currently should be members of the San Francisco City and County Employees' Retirement System, under Section 169 or Section 171.1 of the Charter."

O P I N I O N

Essentially you state that George E. Harrison became a pilot and William Thielmeyer became a chief engineer on a fire boat operated in connection with the San Francisco Fire Department. That both of these employees became so employed and became members of the retirement system under the old charter, i.e., before the adoption of the 1932 charter. It is the contention of these men, through Mr. Crowley, that they should be considered as members of Firemen's Relief Fund under the provisions of Chapter VII, Article IX of the old charter, as of the time of their respective appointments to their respective positions, and that therefore, currently, they should be considered members of the retirement system under the provisions of §169 of the new charter.

Sec. 6, Chapter I, Article IX of the old charter provided as follows:

> "Sec. 6. All persons appointed to positions in the Department must at the time of their appointment be citizens of the United States, not less than twenty-one nor more than thirty-five years of age, of good character for honesty and sobriety, and able to read and write English; they must have been residents of the City and County at least five years next preceding the date of their appointment; they must pass a medical examination under such rules and regulation as may be prescribed by the Commissioners, and, must upon such examination, be found in sound bodily health; provided, however, that the age limit herein prescribed shall not apply to engineers and pilots of fireboats, to engineers, mechanics, and employees of the auxiliary fire system or of the corporation yard, or to clerks in the office of the Commission; but the age of such persons in this proviso named shall, at the time of their appointment, be not less than twenty-one nor more than fifty-five years; and, provided further, that employees and appointees in this proviso named shall not be subject to nor derive any benefit from the provisions of Chapter VII of this Article relating to Firemen's Relief Fund."

It will be noted that Sec. 6, supra, of the old charter excluded pilots and engineers of fireboats from the age limitation otherwise required for appointment in the fire department, and then specifically provided that the employees and appointees so excluded from the age limitation required of members of the fire department "shall not be subject to nor derive any benefit from the provisions

of Chapter VII of this Article relating to Firemen's Relief Fund."

Section 162 of the new charter adopted in 1932, in defining who shall be considered as members of the fire department for retirement purposes, provides as follows:

> "Section 162. For the purposes of the retirement system, any officer or employee of the police or the fire departments whose employment therein began prior to January 1, 1900, or whose employment therein began on or shall begin after that date and was or shall be subject to a charter maximum age at the time of employment of not over thirty-five years, shall be considered to be a member of the police department or the fire department, respectively. Any fire or police service outside the limits of the city and county performed by a member of the retirement system and under orders of a superior officer of any such member, shall be considered as city and county service, and any disability or death incurred therein shall be covered under the provisions of the retirement system."

Neither Mr. Harrison, nor Mr. Thielmeyer was employed by the fire department prior to January 1, 1900, nor was either subject to a charter maximum age of not over thirty-five years at the time of his employment. Hence, under the provisions of Section 162 of the new charter, neither of these men could be considered as members of the fire department, forpurposes of the retirement system, as of the time of the adoption of the new charter.

The arguments advanced by Mr. Crowley in his letter, such as (a) pilots and engineers of fireboats have always been required to wear the regulation uniform prescribed for members of the fire department, and (b) that pilots and engineers are subject to the orders of the captain of the company and shall perform all duties as required by the chief of the department, assistant and battalion chiefs, (as well as the other arguments therein advanced) must fall in view of the clear and distinct provisions of Sec. 6, supra, of the old charter, which in no uncertain language state that pilots and engineers of fireboats shall neither be subject to nor derive any benefits from the provisions of the Firemen's Relief Fund, and Section 162 of the new charter which does not recognize persons occupying positions such as are held by Mr. Harrison and Mr. Thielmeyer as being members of the fire department at the time of the adoption of the new charter.

Section 169 of the new charter only applies to members of the fire department who were members thereof on the 8th day of January, 1932 (the time of the adoption of the new charter), and in this connection provides in part as follows:

> "Section 169. Persons who are members of the fire department on the 8th day of January, 1932, shall

become members of the retirement system on that date, subject only to the following provisions, in addition to the provisions contained in sections 158 to 163, both inclusive, of this charter:
* *."

Hence, I must conclude that George E. Harrison, pilot of a fire boat, and William Thielmeyer, chief engineer of a fire boat, at the time of their respective appointments to their respective positions, were not members of the Firemen's Relief Fund under the old charter, nor members of the fire department under Section 162 of the new charter, and are therefore currently not members of the retirement system under section 169 of the new charter. Rather, Mr. Harrison and Mr. Thielmeyer are members of the retirement system under the provisions of Section 171.1 of the new charter, which is the section under which they are currently classified and listed by and on the records of the San Francisco Retirement System.

You are thus advised in connection with your inquiry as submitted.

Respectfully submitted,

DION R. HOLM
City Attorney

TO; Mr. Ralph R. Nelson
Consulting Actuary
Retirement Board
460 McAllister Street
San Francisco 2

NSW

No. 279

November 14, 1950.

SUBJECT: JUNIOR MUSEUM, CORONA HEIGHTS - CLAIM OF WILLIAM HORSTMEYER, CONTRACTOR.

Gentlemen:

I am in receipt of your request for an opinion as follows:

"On April 27, 1950, the William Horstmeyer Company, was awarded a contract entitled 'Furnishing and Installing Equipment for Junior Museum, Corona Heights Playground' No. 45, Controller's certification No. 56, by the Recreation Commission. However, this contract was not certified by the Controller until August 10, 1950 solely because of a dispute between City Departments.

"One of the sub-contractors of the William H. Horstmeyer Company in the Equipment Contract No. 45, has requested a $262.00 advance in his proposal - being the difference between the cost of furnishing opera chairs at the time the proposal was requested April 11 and August 10 when the William H. Horstmeyer Company notified him that the equipment contract was in full force and effect.

"Please advise the writer whether the William H. Horstmeyer Company has any claim against the city for the $262.00. Also, if the city is liable, in what manner should the money be paid to the contractor; that is, should it be paid by a modification order to the contract or must the contractor sue the city."

O P I N I O N

The problem presented is not one involving extras, alterations or modifications, which are covered in section 97 of the charter.

Because of the delay in certification by the Controller (section 86 Charter) the cost of certain equipment increased. The contractor apparently did not have a firm commitment from the subcontractor so as to protect it in the event of a price rise. No privity of contract exists between the city and the said subcontractor. The contract was duly awarded to the successful bidding contractor, Horstmeyer. I have examined the contract and nothing appears therein as a saving clause in favor of the contractor in the instant case.

The bidder is presumed to know the law and made his bid subject to the Charter requirement (§86) that the contract must be certified by the controller. The contract also provides, p. 12, §7, (general conditions) subd. (a): (in part) "The Contractor shall bear all losses and damages directly or indirectly resulting to him, to the City, or to others on account of the performance or character of the work, unforeseen difficulties, accidents, or any other causes whatsoever. . . "

Therefore, it is my opinion that the Horstmeyer Company does not have a valid claim against the City for the $262.00. The remaining inquiries are now moot. You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

CWH

To: Recreation and Park Dept.

No. 280

November 14, 1950

SUBJECT: SUBDIVISION MAP ACT - MAY CITY PLANNING COMMISSION APPROVE A BUILDING PERMIT BEFORE FINAL MAP IS APPROVED BY SUPERVISORS.

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

"The Charter of the City and County of San Francisco and the Subdivision Map Act of the State of California establish certain steps to be followed in recording new subdivisions. Among these are, briefly:

1. Submission of Tentative Map.
2. Report of Planning Commission thereon, to the 'designated agency' of the legislative body, (here the Director of Public Works).
3. Approval of Tentative Map by the Director of Public Works, reported directly to the subdivider.
4. Filing within one year thereafter of a Final Map.
5. Approval of the Final Map by the Director of Public Works as Advisory Agent.
6. Approval of Final Map by the Board of Supervisors.
7. Filing of same in office of Recorder.

"An alternative procedure, in which a 'record of survey' map is made instead of the final subdivision map, can be used only in certain specified special cases, one of the conditions being that 'the lot design meets the approval of the governing body' - see Business & Professions Code, 11535(b).

"The point is that in either case, an act of approval by the legislative body is one of the final steps.

"Applications for building permits have been referred to this office for approval, which are found to apply to construction of dwellings on lots in a proposed new subdivision. The subdivision procedure in this case has been carried through steps 1, 2 and 3 as listed above.

"Your advice is desired as to whether such permits may be approved for issuance, prior to action by the Board of Supervisors approving a final map, or of the lot design in a Record of Survey Map in case the alternate procedure should be applicable.

"Clearly the lots in a subdivision may not be sold until a final map is recorded. Our problem is whether we can certify as to compliance with all parts of the City Planning Code of any specific dwelling proposed, in the absence of any precise and final recorded map showing the location of the parcel upon which it is to be placed.

"Your advice at the earliest convenience will be appreciated, as we are faced with the need for an immediate decision involving about thirty dwellings."

O P I N I O N

Essentially, you ask whether you may approve a building permit (insofar as zoning matters are concerned), where such a permit to build is requested in connection with a subdivision development, and where no final map thereof has been approved, or even presented for approval, by the Board of Supervisors, and necessarily no such final map has ever been recorded in the office of the Recorder.

The provisions of the subdivision map act are found in Sections 11500 et seq of the Business and Professions Code. The procedure therein outlined, in connection with subdivision maps, is briefly as follows:

(a) A subdivider is required to prepare and file a "tentative map" showing the design of a proposed subdivision.

Sections 11503, 11550
Business and Professions Code

(b) This filing of a "tentative map" is to be made with the "advisory agency", if one be appointed by the Board of Supervisors.

Sec. 11550 B & P Code

In San Francisco, the Director of Public Works was designated by ordinance of the Board of Supervisors to be the "advisory agency".

Ordinance No. 2250,
Bill No. 2362

(c) The "advisory agency" authority is to make investigations and reports on the design and improvement of proposed subdivisions.

Sec. 11509 B & P Code

(d) The "advisory agency" has been authorized by our ordinance (Ordinance No. 2250), and under the provisions of Section 11552 B & P Code to make its report, in connection with any tentative map of a proposed subdivider, directly to the subdivider.

(e) Following this, assuming the tentative map is approved by the advisory agency, then the "final map" is to be filed with the Board of Supervisors for its approval.

Sections 11610, 11611, B & P Code.

(f) This "final map," when approved by the Board of Supervisors (and proper bond or deposit be made if Sections 11612 or 11613 of B & P Code be applicable) is to be transmitted to the County Recorder for recordation.

(g) Under the record of survey procedure outlined in Section 11575, B & P Code, before any recordation of the survey map may be made, a certificate must be executed by the Clerk of the Board of Supervisors approving the survey map in accordance with the conditional approval of the tentative map. (11576, B & P Code)

(h) Until a final map, or record of survey map, is duly recorded or filed in the office of the Recorder of the county in which any portion of the subdivision is located, it is unlawful for any person to offer to sell, to contract to sell, or to sell any subdivision or any part thereof.

Sec. 11538, B & P Code

Thus we see that the approval of a tentative map by the "advisory agency" is only one step toward establishment of a proper subdivision. There must also follow, the approval of the final map or record of survey map by the legislative body (Board of Supervisors in San Francisco), and recordation of the map as so approved.

In your inquiry you indicate that in your problem at hand matters have progressed only to the point where the "advisory agency" has approved the tentative map. You indicate that you have been requested to approve building permits to permit of the construction of dwellings on lots in a proposed new subdivision, and this approval was sought of you before any final map had been approved by the Board of Supervisors, or even filed with the Board for approval, in connection with the proposed subdivision, as well as before the recordation of any final subdivision map or record of survey map had been made.

Under these circumstances I believe that the application for the building permit is prematurely sought, and you should not approve of any building permit to construct premises in a proposed subdivision where the subdivision Final Map or Record of Survey Map has not been finally approved or established by the Board of Supervisors.

You are thus advised in connection with your inquiry as submitted.

Very truly yours,

DION R. HOLM
City Attorney

NSW

To: Mr. Paul Oppermann
Director of Planning

OPINION NO. 281

November 15, 1950

SUBJECT: VALIDITY WATER DEPARTMENT LEASE NO. 2256
THE SPRING VALLEY WATER COMPANY AND
EMPIRE MINES INVESTMENT COMPANY

Dear Sir:

I have your request for an opinion as to the validity of San Francisco Water Department Lease No. 2256. The validity of this lease has been questioned in that its term extends for a period of fifty years. (With certain exceptions, Civil Code Section 717 inhibits an agricultural or horticultural lease for a longer period than fifteen years).

This lease was originally entered into the first day of November, 1920, between the Spring Valley Water Company as lessor and the Empire Mines Investment Company as lessee, covering 136.35 acres, at $6.00 per acre rental payable annually over a period of fifty years. There was imposed upon the City the lessor's obligation under this lease by the acquisition of the Spring Valley Water Company properties on March 3, 1930.

Title search of this property discloses that by deed from Filoli Incorporated to Matson Securities Company, dated January 13, 1937, and recorded January 14, 1937, in Volume 723 of Official Records of San Mateo County at page 183, this lease was assigned by the lessee to the Matson Securities Company.

O P I N I O N

Examination of the lease discloses that it is a general purpose lease of the particularly described land. The restrictions set forth in the lease refer to the use to be made of the land so as not to contaminate or pollute the water shed; in no manner, in my opinion, could this lease be interpreted as a lease of land for agricultural purposes.

There is no provision in the lease with respect to assignment of either the lessor or the lessee's interests. In fact, the lease discloses, in paragraph V thereof, that at the time of its inception it was contemplated by the parties that the lessee's interest was to be conveyed to the Filoli Estate and that such grantee of the lessee was to be bound by the provisions of the lease.

In the absence of statutory or contractual restrictions to the contrary, a lessee for years may, without the lessor's consent or even an express provision in the lease, assign the same. See: 35 C. J. 976; HERMAN vs. ROHAN, 37 Cal. App. 678.

In the absence of statutory regulation, a lease may be made for any lenth of time that the parties select.

See: Tiffany on Real Property, Vol. 1 (2d Ed.) §39. In the case of MONBAR vs. MONAGHAN, 162 Atl. 50, a lease for 2000 years was held valid. There is no statute in this state which determines the maximum period of time with respect to the lease of the type of property herein under discussion.

I therefore advise you that, in my opinion, the San Francisco Water Department lease No. 2256, between the City and County of San Francisco, as grantee of the Spring Valley Water Company, and the Matson Securities Company, as assignee and successor of the Empire Mines and Investment Company, is a valid lease.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. John R. McGrath
Clerk of the Board of Supervisors
235 City Hall
San Francisco 2

UGM

OPINION NO. 282

November 14, 1950

SUBJECT: PRESENT STATUS OF TITLE IN PROPERTY AT 150 OTIS STREET (JUVENILE DETENTION HOME).

Dear Sir:

I am in receipt of your request for an opinion as follows:

REQUEST

"The Juvenile Court Department will soon be moving to new facilities, known as the Youth Guidance Center, west of Twin Peaks.

"The Chief Administrative Officer has been kind enough to provide some information regarding the probable disposition of the property at 150 Otis Street after being vacated by this department. However, we are in need of a clear legal interpretation so that we may understand our rights as a department to the property at 150 Otis Street. May we have information on the following:

"1. Will the land and improvements be allocated to the Juvenile Court Department? If not, what department holds title, and what part thereof?

"2. If only the improvements are allocated to the Juvenile Court Department and sold to another city department or to a private purchaser, how can the funds be utilized? For example:

(a) For the purchase of the land now occupied by the new Youth Guidance Center.

(b) Applied to current or future construction costs of the Youth Guidance Center.

(c) Future improvements at the Log Cabin Ranch School.

(d) Held without allocation by this department for future Juvenile Court Department capital expenditures.

"Attached you will find exchange of communications with the Chief Administrative Officer and his Executive Secretary and this department on this subject.

"May we have a City Attorney Opinion on the above as early as possible?"

O P I N I O N

Your foregoing request can only be answered by exploring historical antecedents of striking moment in the panorama of San Francisco's past.

The 150 Otis Street building (Juvenile Detention Home) is erected on a parcel of land - 137½ feet by 137½ feet - which was reserved under the Van Ness Ordinance (Ordinance No. 822 - Approved June 20, 1855; see also confirming Ordinance No. 845 - Approved September 27, 1855) for school purposes. (See Municipal Reports 1867-68, pp. 588-593.) Under those ordinance directives, a body of commissioners designated, among other school sites, the following parcel of land to be set aside for school purposes:

> "Middle 50 vara Lot in Block No. 21, on Mission Street, between Ridley and Hermann streets." (Municipal Reports 1867-1868) p. 593)

By virtue of name changes in those streets, what was then Mission (West Mission) is now Otis, Ridley is now Duboce, and Hermann is now McCoppin. (See Record of San Francisco Real Estate "Miscellaneous", Block 3512-3513)

At the time of the passage of the Van Ness Ordinance, the City of San Francisco had pending before the United States Land Commission a claim that there be confirmed to it four square leagues of land as the successor to the former Mexican pueblo. Because of the conquest of Mexico by the United States, and pursuant to the Treaty of Guadalupe Hidalgo, the federal government had come into the ownership of the Mexican public land rights in California, including the pueblo of which the City of San Francisco was the successor. Upon

the admission of California to the Union, it became vested with the powers of the United States Government over the public lands in California taken from the Mexican government. This latter proposition is supported by the following declaration in BOARD OF EDUCATION v. MARTIN, 92 Cal. 209, at 216 (wherein the Court speaks concerning a parcel of land also reserved for school purposes under the same Van Ness Ordinance):

> "The lands in question were originally held by the pueblo in trust for the public, and subject to the control of the Mexican government. After the cession of California to the United States, the management of this trust was subject, in the first place, to the control of the general government, and became vested in the state of California upon its establishment as a sovereign member of the Union. Upon the organization of the city of San Francisco, its boundaries embraced a portion of these lands, but their title continued to remain impressed with the same trust. The property, as well as the trust upon which it was held, and the corporation to whose management it was intrusted, was municipal, and therefore subject, as all political institutions, trusts, and property, to the direction and control of the superior authority of the sovereign."

After providing (sec. 6) that the city reserved the right to set aside lots for public purposes (among which expressed purposes were "for school houses"), the Van Ness Ordinance declared (sec. 10) that:

> "Application shall be made to the Legislature to confirm and ratify this Ordinance, and to Congress to relinquish all the right and title of the United States to the said lands, <u>for the uses and purposes hereinbefore specified.</u>" (Emphasis added)

On March 11, 1858, the California Legislature confirmed and ratified the Van Ness Ordinance (Stats. 1850, p. 52 et seq); and on July 1, 1864, Congress granted to the City "for the uses and purposes specified" in the Van Ness Ordinance all of the right and title of the United States in the lands involved (see Municipal Reports 1867-68, p. 596).

An evaluation of those confirming and granting actions is phrased as following in the Martin case, supra, at page 217:

"By the act of March 11, 1858, ratifying and confirming the Van Ness Ordinance, it was declared by the state that the lands that had been reserved under that ordinance were reserved for public purposes, and this reservation was afterwards confirmed by Congress by the act of July 1, 1864. These principles have so often been affirmed by the courts of this country that it is only necessary to refer to a few leading cases in which they may be found." (Citing HART v. BURNETT, 15 Cal. 530; PAYNE v. TREADWELL, 16 Cal. 224; SAN FRANCISCO v. CANNAVAN, 42 Cal. 541; TOWNSEND v. GREELEY, 5 Wall. 326; SAN FRANCISCO v. LEROY, 138 U. S. 656.)

At page 220 of that same opinion, the Court concedes that because of the reservation of the property therein involved as "public property" (i. e., as a school lot), such property "was at all times thereafter subject to the control of the state."

It cannot be doubted that the entire system of public schools and public education is a matter of state, rather than municipal, concern. (BUTTERWORTH v. BOYD, 12 Cal. (2d) 140; ESBERG v. BADARACCO, 202 Cal. 110; PIPER v. BIG PINE SCHOOL DISTRICT, 193 Cal. 664; SAN FRANCISCO UNIFIED SCHOOL DISTRICT v. SAN FRANCISCO, 54 Cal. App. (2d) 105.)

From what has been set out above, it is manifest that the State of California has full power of control over both the parcel of land concerning which your inquiry is made (and other parcels similarly dedicated) and the system of public education for which that parcel was reserved and dedicated. It yet remains to be determined, however, what provisions the state legislature has made with regard to the right to hold and control public properties so dedicated for school purposes.

The Board of Education of the City and County of San Francisco was created, and its powers and duties defined, by an act of the California Legislature passed April 27, 1863. (Stats. 1863, p. 601 - see BOARD OF EDUCATION v. MARTIN, supra, p. 219.) As a "creature of the legislature," the Board had only such powers as were granted in the creating legislation and any amendments thereto. (BARRY v. GOAD, 89 Cal. 215) Additional powers could be given the Board by provision of the San Francisco Charter; such charter being, in the approval procedure, an expression of state legislative will. (MAHONEY v. BOARD OF EDUCATION, 12 Cal. App. 293)

Under the terms of the creating statute above noted, it was provided (sec. 2) that the Board should have sole power, inter alia:

> "To receive, purchase, lease, and hold in fee, in trust for the City and County of San Francisco, any and all real estate, and to hold in trust any personal property that may have been acquired, or may hereafter be acquired, for the use and benefit of the Public Schools of said city and county; . . . ." (Emphasis added)

In other portions of the same Section 2, the Board was given power to "sell or exchange" certain school lots - with the proviso that the proceeds of such permitted transactions "shall be applied exclusively" to school purposes.

By amendment of March 12, 1864, the foregoing "sell or exchange" provision was enlarged to allow the sale or exchange of any school lots reserved under the Van Ness Ordinance - subject to the same proviso noted in the preceding paragraph hereof. (Stats. 1863-64, p. 162)

It must be noted, and the pertinence of this observation will be made evident hereinafter, that no power was given the Board which would allow it to donate or make a gift of any school lot. Under the statute, as amended, the Board held such lots, in fee and in trust, "for the use and benefit of the Public Schools."

In 1872 the California Legislature adopted the Political Code. In sections 1575 et seq thereof, it set up and provided for the powers to be exercised by school districts and the boards of trustees and education which were to manage such districts. It is significant that no power was given such boards to rid themselves of title in and control over school property by making gratuitous transfers thereof. (See Pol. Code (1872), sec. 1617) It was further provided by such Code (sec. 1616) that the powers of boards of education in cities were to be determined by the special laws applicable to such cities, except as otherwise provided in the code. As before noted, under the special law applicable to the San Francisco Board of Education (Act of April 27, 1863, supra), no power to donate school property was given; and, as discussed above, nothing "otherwise" was provided in the Political Code - i. e., the code conferred no such power.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT v. SAN FRANCISCO, 54 Cal. App. (2d) 105 (hearing denied by Supreme Court), is of momentous import at this stage of our problem. Therein the court held that the effect of the creation of school districts by the aforementioned Political Code (especially section 1575) was to create such districts as successors to the various boards of education which had held and controlled school property. That holding of the court is couched in the following language: (page 108)

> ". . . we must hold that the Legislature had power to designate the school districts as successors in title to school boards which had theretofore held property in trust for school purposes, and we are satisfied that such was the purpose and effect of Political Code, section 1575 . . . ."

In ESBERG v. BADARACCO, 202 Cal. 110, it is pointedly held that by virtue of Section 1576 of the Political Code ("Every city . . . shall constitute a separate school district . . . ."), the territory making up San Francisco constituted a school district. The Court also held that the Board of Education of such district was the successor of the board previously created by legislative action prior to the birth of the school district in San Francisco under the Political Code.

With the enactment of the School Code, in 1929, the Legislature provided (section 2.2120) that upon the creation of a Unified School District, all funds, property, and obligations of the preexisting district would become those of the Unified School District. In SAN FRANCISCO UNIFIED SCHOOL DISTRICT v. SAN FRANCISCO, supra, the court, after having said that the district succeeded to the title of the former board, said the following re the effect of unification: (p. 108)

> "Upon the creation of the San Francisco Unified School District the title to this property (site of former Lincoln School at Fifth and Market Streets) passed to it under School Code, section 2.2120." (Parenthetical matter added)

In 1943 the School Code was recast, and the law formerly embraced therein is now found in the Education Code. Section 4669 contains the language (inter alia, of succession to School District property by the Unified School District) formerly found in School Code, section 2.2120.

At the present time, then, the San Francisco Unified School District is the successor, in title and trust, to the Board of Education which, as set out above, held the title (subject to the same public trust for school purposes) to the Van Ness Ordinance "school lot" which underlies the present Juvenile Detention Home.

Answering your first question further necessitates an exploration of the sequence of events by which the school lot in question became improved by the erection thereon of the Juvenile Detention Home.

In 1880 a school building was erected thereon - the name given thereto being Peabody Primary School. The great fire of April 18, 1906, completely destroyed the building and its contents. (See Record of San Francisco Real Estate "Miscellaneous", Block 3513)

By Ordinance No. 344 (New Series), approved January 17, 1908, the Board of Supervisors purported to set aside, reserve, and dedicate the same Peabody School lot for "Free Market" purposes. The ordinance recited that the Board of Education had consented to a transfer to the Board of Supervisors so that the lot might be so used for free market purposes. It was further recited therein that the "net proceeds arising from said Free Market be placed to the credit of the Common School Fund"; and, additionally, that if both boards later determined that such lot be needed for school purposes, the "lot shall be transferred by said Board of Supervisors to the School Department."

As discussed above, there was absolutely no power in state law allowing the Board of Education to make such transfer of the Peabody School lot for the purposes expressed in the beforenoted ordinance. Under the city charter of 1900, a power to lease school property not in use as such was given the Board of Education (Art. VII, Chap. III, Section 11), but it is manifest from the ordinance that such action was not taken in accordance with the conditions imposed by, nor was it intended by the Board of Education to act under, such grant of power. A charter - expressed power would have sufficed because of the legislative approval of the charter (MAHONEY v. BOARD OF EDUCATION, supra); but, as noted above, there was no attempt to act under the leasing powers granted in the charter.

Such violation (doubtlessly unintended) of its public trust in no wise divested the School District of its title, power, and control over the lot in question; but it continued, under applicable law, to hold title subject to the (school) purposes of the trust.

(BOARD OF EDUCATION v. MARTIN, supra; HOADLEY v. SAN FRANCISCO, 50 Cal. 265)

At some undetermined time the Board of Supervisors must have taken action purporting to retransfer the Peabody School lot to the Board of Education, for by its Resolution of April 21, 1914, the Board of Education "transferred" the Peabody School lot to the Board of Supervisors "for the use and purpose of the Juvenile Detention Home".

By Resolution 10856 (New Series), approved May 7, 1914, the Board of Supervisors "transferred" the same lot "from the School Department for the use and purposes of the Juvenile Detention Home". At page 944 of Municipal Reports, 1915-1916, in the report of the Probation Officer to the Mayor, it is stated that the lot which was to be the site of the contemplated Juvenile Detention Home had been "donated for the purpose by the Board of Education".

Under the law fully noticed above, the Board of Education was completely without power to do that which it purported to do by its resolution of April 21, 1914; and, also under the law discussed above, the property remained in the school district impressed with the trust for school purposes.

Since the state legislature had never vested the Board of Education with the power to"donate" the Peabody School lot to the Board of Supervisors, or anyone else, any attempt to do such was nugatory; and any attempted dedication of the lot for anything but school purposes, since it lacked state legislative sanction, was an idle act. By virtue of the succession of title noted above, it must inevitably be concluded that title to the land underlying the Juvenile Detention Home is now in the San Francisco Unified School District.

I am of the opinion, however, that the Juvenile Court Department (now known as the Youth Guidance Center) would be entitled to have allocated to it the proceeds from any separate sale of the 150 Otis Street building which might be made.

The position of the Juvenile Court Department during its occupancy of the school lot at 150 Otis Street, in view of the law set out above, was only that of a mere licensee. With the clear consent of the governing board of the owner-school district, the department went into occupation of the lot, and erected thereon a nine-floor building at an expense in excess of $160,000.00. (See

Municipal Reports, 1915-16, p. 933)

It is the law of this state that where structures are erected upon land by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the licensee will be implied in the absence of evidence of a contrary intention. (GOSLINER v. BRIONES, 187 Cal. 557; TAYLOR v. HEYDENREICH, 92 Cal. App. (2d) 684; MURR v. COHN, 87 Cal. App. 478; CITY OF VALLEJO v. BURRILL, 64 Cal. App. 399 (hearing denied by Supreme Court)

There would appear to be no evidence herein of such "contrary intention" as would negate the application of the above rule. Indeed, it would appear probable, because of what seems to have been a misunderstanding of applicable law, that the Board of Education, by its resolution of April 21, 1914, was really intending to finally transfer its title to the Peabody lot to the Juvenile Detention Department. As discussed above, the law aborted that intention; but, with equal force, the rule of the Gosliner and other cases, as noted, preserves to the Youth Guidance Center its interest in the building. Upon sale of the building, the proceeds thereof must be allocated to the Youth Guidance Center as provided in, and subject to the conditions of, Section 92 of the charter.

The applicable portions of Section 92 are as follows:

> "The proceeds of the sale of any property (referring to real property) under the control of a department shall be applied by the supervisors to the purchase of additional <u>land</u> for the use of such department if required thereby. Otherwise such proceeds shall be applied to the purchase of additional <u>real property</u> for any city and county purpose, provided, <u>however, that</u> the proceeds of the sale of any property acquired for the use of any utility shall revert to the funds of said utility." (Parenthetical matter and emphasis added)

It will be noted that the foregoing allow the proceeds of sale to be used for buying additional <u>land</u> if the controlling department "requires" such land. The "<u>requiring</u>" feature presents a question of fact in each case. If such additional <u>land</u> is not required by the controlling department, the section declares that the proceeds shall be applied to the purchase of additional <u>real property</u> for any city and county purpose, subject to the utility exception

noted. (See remarks, infra, concerning charter amendment of November 7, 1950.)

In KROUSER v. COUNTY OF SAN BERNARDINO, 29 Cal. (2d) 766, in interpreting certain provisions of the Municipal Corporation Act of 1883 respecting signing of petitions for incorporation by landowners within the proposed corporate limits, the Court declared the legal difference which exists between 'land' and 'real property'. After pointing out that Civil Code, section 659, defines 'land' as "the solid material of the earth, whatever may be the ingredients of which it is composed . . ."; and that section 658 of the same code defines 'real property' as "1. Land; 2. That which is affixed to land, etc.", the Court says:

> "In accordance with the foregoing sections land is deemed to be something distinct from the buildings, fences, and other improvements placed thereon by man's work. Real property on the other hand, within the code definitions, is all-inclusive and contemplates both land and improvements . . . ."

While the Court points out that the problem is dominantly one of interpretation, and that the above analysis of the difference between 'land' and 'real property' is not an unalterable one (see pages 769-771), the general tenor of the beforenoted portion of section 92 would seem to compel the same conclusion herein as reached by the Supreme Court in the above case. Since the word 'land' is used in the same section with the words 'real property', such leads me to conclude that a different meaning was intended by each designation. Hence, the funds received on a sale of the Juvenile Detention Home (building) could only be used to purchase additional <u>land</u> for the Youth Guidance Center, if such land is required by such department.

It might here be noted, parenthetically, that in the election of November 7, 1950, the electorate voted certain amendments to Section 92 of the Charter, which amendments relate to the use for capital improvements of monies derived from sales of real property. However, those amendments pertain to matters not herein involved, and will not, assuming state legislative approval thereof, affect the conclusions just drawn.

In accordance with all of the foregoing, you are advised as follows with regard to your questions, seriatum:

1. Only the improvements (i. e., building) on the 150 Otis Street property can be allocated to your department; and

2. The proceeds from the sale of such improvements can be utilized only for the purchase of land for your department, if such land is required by you. Any other attempted utilization of such funds would violate the charter. Of course, such proceeds of sale could be used to purchase the land now occupied by the Youth Guidance Center; providing, factually, that such land is required by the Youth Guidance Center.

Respectfully submitted,

DION R. HOLM
City Attorney

WFB

To: Mr. George Ososke
Chief Probation Officer
Youth Guidance Center

OPINION NO. 283

November 15, 1950

SUBJECT: DISASTER COUNCIL CONFERENCE WITH ASSOCIATED GENERAL CONTRACTORS - WAGES FOR PERSONNEL - COMPENSATION INSURANCE - CIVIL SUITS AGAINST CONTRACTORS ENGAGED IN DISASTER COUNCIL ACTIVITIES - PENALTIES FOR DELAY IN PERFORMANCE OF CONTRACTS BY REASON OF DISASTER ACTIVITIES.

Dear Sir:

This office is in receipt of your request for an opinion by reason of two of the questions raised by Mr. Sherman Duckel, Director of Public Works, arising from possible participation by the members of the Northern California Chapter of the Associated General Contractors of America, Inc., in the Disaster Council Program of the City and County of San Francisco. I have re-stated the questions as follows:

The first question is what protection against civil suits would participating contractors have where litigation resulted from demolition of buildings arising from disaster activities.

The second question is what penalties for delays in completing contracts could participating contractors anticipate to result where equipment is pulled off a job to do disaster work.

OPINION

1. The general rule relative to the power of municipal corporations to destroy private property in the event of an emergency may be stated as follows:

> "The rule is uniformly sustained and may be expressed in general terms that the inhabitants of a municipal corporation hold their property subject to a reasonable exercise of the police power. Private property being held subordinate to the public interest may be destroyed, to protect the public welfare, when such property becomes a nuisance or dangerous to the

public health, morals, or safety, and, if so, it may be destroyed in case of an emergency where such emergency distinctly appears, which is always a condition precedent to the invasion of private property rights. For example, where buildings or other structures become dangerous, or to prevent the spread of fire."

3 McQUILLIN - MUNICIPAL CORPORATIONS 69

In conformity with the foregoing rule, Section 36 of the charter provides:

"The chief of department (Fire) or in his absence any assistant chief of department, or in their absence any battalion chief in charge, may, during a conflagration, cause to be cut down or otherwise removed any buildings or structures for the purpose of checking the progress of such conflagration."

The responsibilities and immunities of volunteers in disaster work are set forth in section 1591(a) of the Military and Veterans Code, as follows:

"Responsibilities and immunities of volunteers: Liability for injury or property damage sustained by volunteer: Right to statutory or insurance benefits. (a) Volunteers duly enrolled or registered with any war, defense, or disaster council of any public agency, in carrying out, complying with, or attempting to comply with, any order, rule or regulation issued or promulg ted pursuant to the provisions of this chapter or any local ordinance, or performing any of their authorized functions or duties or training for the performance of t heir authorized functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of counties or cities performing similar work for their respective entities."

There still remains to be answered the question what are the immunities of officers and employees performing similar work for their entities.

The general rule is that a municipal officer is not liable for private suit for his acts done with care in the honest performance of his corporate duties.

2 McQUILLIN - MUNICIPAL CORPORATIONS 277

The California rule is stated in 21 CAL. JURIS., §17, at page 405, to be as follows:

> "Pursuant to settled rules, a public officer is not responsible for the acts or omissions of police officers employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless such officer has directed the acts to be done or has personally co-operated therein, or unless, having the power of appointment, he has failed to use ordinary care in the selection."

It is my opinion that the contractors participating in Disaster Council activities could not be successfully sued in a civil action arising from activities performed with ordinary care by them in this program. The contractors would be acting pursuant to direction of the chief of the fire department and thus acting in a public official capacity without incurring civil liability.

2. The second question presented by you involves the law of the performance of contractors.

The general rule is that the moment a contract is made, a right is vested in each party to have it remain unaltered and have it performed.

6 CAL. JURIS. 396

There are certain situations in which the performance of a contract is excused in this state by operation of law. Section 1511 of the Civil Code provides in part as follows:

> "What excuses, performance, etc.
> The want of performance of an obligation, or

of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

. . . . . .

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; . . . ."

In view of the foregoing code provision, it is my opinion that penalties for delays in completion of contracts in progress when equipment is pulled off of a job to do disaster work of the type described in Section 1511, subd. 2, quoted above, would not be legally enforceable. However, it would be advisable to include a provision in all future contracts nullifying penalties for delays in performance where they arise from participation in Disaster Council activities.

You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

LTK

Office of Mayor

No. 284

November 15, 1950

SUBJECT: LATERAL SUPPORT FROM ADJOINING OWNER - RICHMOND PLAYGROUND

Gentlemen:

This office is in receipt of your request for an opinion relative to a retaining wall required between property owned by Mr. and Mrs. Orison P. Buck and the Richmond Playground. Attached to your request is the correspondence containing communications between your department and said Mr. and Mrs. Buck which, as requested, has been reviewed. It appears that the situation has to do with the construction of the new Richmond Playground and "in constructing the new playground it became necessary to provide a reinforced concrete wall along the southerly property line of the playground and adjacent to the Buck property. Unfortunately, it developed that the footing or the base of this concrete wall must be placed about three feet below the bottom of the concrete foundation of the Buck flats.

While the wall to be constructed is well within the property line of the playground, there is a possibility that the ground under the foundation of the flats may become weakened. This may cause some damage to the Buck property on account of deficiency settling if protective measures are not taken."

I have ascertained that the work in mind has not as yet been undertaken and before performing the same that it would be well to follow the law as stated in the following opinion.

O P I N I O N

Section 832 of Civil Code provides as follows:

"LATERAL SUPPORT FROM ADJOINING OWNER. Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner or owners of the adjoining land to make proper and usual excavations on the same for the purpose of construction or improvement, under the following conditions.

"1. Any owner of land or his lessee intending to make or to permit an excavation shall give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating the depth to which such excavation is intended to be made, and when the excavation will begin.

"2. In making any excavation, ordinary care and skill shall be used and reasonable precautions taken to sustain the adjoining land as such, without regard to any building or other structure which may be thereon, and there shall be no liability for damage done to any such building or other structure by reason of the excavation, except as otherwise provided or allowed by law.

"3. If at any time it appears that the excavation is to be of a greater depth than are the walls or foundations of any adjoining building or other structure, and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure must be allowed at least thirty days, if he so desires, in which to take measures to protect the same from any damage, or in which to extend the foundations thereof, and he must be given for the same purposes reasonable license to enter on the land on which the excavation is to be or is being made."

It will be observed that section 832 of the Civil Code quoted above provides that the owner of the adjoining land is entitled at all times to have his land supported in its natural state. If the coterminous owner excavates, it is the obligation of the excavator to support the land as such. There is no obligation, however, to do other than to support the land and if it becomes necessary to put in additional piling or retaining walls to support the building, this obligation falls upon the owner of the building. However, the statute further provides that should it be necessary to support the walls or foundations of an adjoining structure, thirty days' notice must be given by the one who proposes to do the excavating. The one doing the excavating, in spite of the notice, must use care and diligence while excavating and may not cause damage to the adjoining property by his negligence. (See SAVER v. O'CONNELL, 67 Cal. App. (2d) 27, 32; WAHREM v. INVESTMENT UNDERWRITERS REPORT, 58 Cal. App. (2d) 346, 350; PACIFIC GAS & ELECTRIC CO. vs. SCOTT, 10 Cal. (2d) 581).

The City and County of San Francisco, therefore, is obligated to support the adjoining land in its natural state, and if it be necessary to build a retaining wall to do so, this must be done. The excavation must also be done in a careful and prudent manner. A thirty days' notice must also be given to the adjoining owners, and such notice must give full information of the intended excavation and the manner in which this work is to be performed. (McIVOR v. MERCER-FRASER CO., 7 Cal. App. (2d) 248) You are cautioned that it is your obligation to ascertain that the notice of the intended

work is actually received by the adjoining owners at least thirty days in advance.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Recreation and Park Dept.
Attn: Mr. William Simons

SDL

Opinion No. 285
November 16, 1950

SUBJECT: DIRECTOR OF PUBLIC HEALTH - PROBATE NOTICES WITH RESPECT TO SAN FRANCISCO HOSPITAL AND LAGUNA HONDA HOME; BILLING OF PATIENTS; PRESENTATION OF CREDITOR CLAIMS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"It is customary for the San Francisco Hospital to review the daily 'Recorder' in order to check the probate notices appearing therein against the files of the San Francisco Hospital and Laguna Honda Home in order that, if the subject persons of such estates have been patients in these institutions in the past, claims for the cost of such care and treatment may be placed against such estates.

"It sometimes occurs that the said deceased persons, at the time they received care in our institutions, were billed in part for their care, pursuant to provisions of the San Francisco Municipal Code (Part II, Chapter V, Article 3, Section 151). A sample copy of such a 'part bill' is hereto attached. It will be noted that the patient is billed only in the amount which it is determined he is able to pay at the time ($25.00 in the case of the attached bill). This bill is entered in our accounting records in the amount of $25.00, which, when paid by the patient, liquidates his obligation insofar as the actual amount for which he is billed is concerned.

"It has been customary for us, in such matters, if the patient expires, let us say in three years, and he leaves an estate in probate, to place a claim against the estate for that portion of the cost of his care which was not billed during his life time.

"It has recently been contended that we have no right to bill the patient's estate, for the difference between the amount for which he was billed and the actual cost of his care which is shown on the bill. The contention is made that since a determination of his ability to pay was made at the time of the patient's discharge from the hospital, and since he paid the full amount of the bill, as presented, and received a receipt therefor, his obligation for all of the service cited on the bill was thereby liquidated.

"For your information, it sometimes occurs that patients are presented with such 'part bills' in consideration of their unemployability, their familial obligations, etc., whereas at the time when their estates are probated these conditions may no longer prevail.

"We should appreciate an opinion from your office as to whether we have a right and obligation to bill the estates of such deceased persons for that portion of the cost of their care as was not billed at the time the care was received.

"If the form of the 'part bill', as attached, is all that is in error, will you kindly indicate such changes as you feel should be made. When issuing a 'part bill', should the same contain a statement to the effect that the City and County reserves its right to bill the estate of the deceased person for that portion of the care which is not being demanded at the time the 'part bill' is issued.

"It is to be noted that, when the patient is not billed at all during his life time, no objection to the presentation of the claim against his estate is usually made; the complaint seems only to arise in those cases where a 'part bill' has been previously issued.

"We have a number of cases at hand of the type cited in this letter, and we will withhold action pending receipt of your opinion."

O P I N I O N

The state law respecting the powers of the board of supervisors regarding the rates to be charged patients admitted to any county hospital is set forth in the first paragraph of section 203.5 of the WELFARE AND INSTITUTIONS CODE as follows:

"HOSPITAL RATES: POWERS OF SUPERVISORS: ADJUSTMENT OR COMPROMISE OF HOSPITAL CHARGES: DISCHARGE FROM ACCOUNTABILITY OF OFFICER CHARGED WITH COLLECTIONS: SECTIONS 202-203 NOT AFFECTED. The board of supervisors in each county may fix the rates to be charged patients admitted to any county hospital and may direct any county officer to collect the amounts due the county for hospitalization and medical care. In fixing and collecting hospital charges the board may exercise all the powers conferred by Article 4 of Chapter 2 of Division 4 of this code. The board, or such county officer as it may authorize or designate, may adjust or compromise hospital charges according to the financial condition of the patient, his estate, or legally responsible relatives."

It is also provided in the foregoing that the board or such county officer as it may designate may adjust or compromise hospital charges.

Pursuant to state law, section 151 of the San Francisco Health Code provides that the Director of Public Health is empowered to

determine the financial ability to pay, in whole or in part, by patients admitted at the San Francisco Hospital, including the Isolation Division and Hassler Health Home.

The state law further provides that the board of supervisors, or such county officer as it may authorize or designate, may adjust or compromise hospital charges according to the financial condition of the patient, his estate or legally responsible relatives. (Section 203.5, WELFARE AND INSTITUTIONS CODE)

In conformity with the state law, the Director of Public Health is authorized to bill every person obligated for institutional service rendered in the San Francisco Hospital, including the Isolation Division and Hassler Health Home as follows:

> (a) The Director of Public Health shall bill every person legally obligated for institutional service rendered in the San Francisco Hospital, including the Isolation Division and the Hassler Health Home, on the basis of the rates to be established as hereinafter provided, and to the extent of their ability to pay, in whole or in part, either directly or through relatives legally obligated to pay in whole or in part, as determined under Section 151 hereof.
>
> Section 151, SAN FRANCISCO HEALTH CODE.

The state law further provides for the discharge of accountability, when authorized by the board of supervisors, of the county officer charged with the duty of collecting amounts due the county for hospitalization and medical care where the amount is too small or that collection is improbable. However, the state law explicitly provides that the discharge of accountability of the officer does not constitute a release of any person from liability for payment of any such amount which is due and owing to the county. (Section 203.5, WELFARE AND INSTITUTIONS CODE)

It also must be noted that Section 153 of the HEALTH CODE provides that every person who is given aid from public moneys drawn from the treasury of the city shall be liable for the aid so given and constitutes a first lien on all property that the recipient may possess, acquire or have an interest in. The said section further provides for an agreement set forth at length and now in use by your department whereby the recipient is compelled to sign such an agreement for reimbursement by him to the city for aid extended to him. It will be noted that the language of the agreement states that the city has a preferred claim against the recipient.

Your request has presented the query as to whether your department has a right and obligation to file a claim in the estates of such deceased former patients for that portion of the cost of their care which was not billed upon the rendition of your "part bill."

Before rendering this opinion in response to your request, I have considered and reviewed my opinion of October 6, 1950, wherein under a different factual situation I gave my opinion that a part payment extinguished the entire obligation of the recipient of public aid to pay a larger sum. In that opinion there was a clear accord and satisfaction. My present opinion is not in conflict with the former opinion because each opinion is based upon a different factual premise.

Section 153 of the HEALTH CODE provides that the recipient of such aid is liable to the extent it was given from public moneys of the city and also by agreement, if one has been signed by him.

The mere fact of discharge from accountability of the Director of Public Health is not sufficient to excuse any recipient of aid from disability for payment of any such amount which is due and owing to the county as previously noted.

The present practice of "part billing" is ambiguous since it cannot be determined from the fact of the statement if it is intended as a whole or partial billing pursuant to Section 151 of the HEALTH CODE. However, it may be concluded from Section 153 of the HEALTH CODE that the intent of the Director of Public Health was not to waive payment or satisfaction of the entire amount of aid extended since two sums are stated plus the explanation that the hospitalization is being billed for in part only.

It is my opinion, therefore, that the estates of deceased recipients should be billed for the sum represented by the difference between the amount of the partial billing and the amount of aid actually extended. However, I believe that the present form of billing should be changed so that the intention of the Director of Public Health to reserve the collection of any unpaid balance at a future date be clearly expressed and made known at the time of any billing.

On the subject of changes to be made in the form of the "part bill" presently used, it is respectfully suggested that this is a function of the Controller pursuant to Section 64 of the Charter and Section 151 (g) of the HEALTH CODE, since it involves the collection of funds payable to the city.

Respectfully submitted,

DION R. HOLM,
City Attorney.

LTK

To: Dr. J. C. Geiger,
Director of Public Health.

Thru: Mr. Thomas A. Brooks,
Chief Administrative Officer.

Opinion No. 286
November 16, 1950

SUBJECT: LOYALTY OATHS (GOV. CODE, CH. 8, DIV. 4, PT. 1); PAYMENT OF EMPLOYEES WHO HAVE NOT FILED THE OATH OR DO SO AFTER NOVEMBER 2, 1950.

Dear Sir:

You have requested an opinion as follows:

"Your opinion is requested as to the legality of making payments after November 2, 1950, to officers or employees for compensation earned or expenses incurred, under the following circumstances:

"1. May payment be made legally after Nov. 2, 1950 for earnings or expenses to (and including) Nov. 2, 1950, where the person has not filed the prescribed oath.

"(a) where said person continues in the employ of the City

"(b) where said person relinquishes
(1) on or before Nov. 2 -
(2) after Nov. 2

"(c) where said person resigns -
(1) on or before Nov. 2 -
(2) after Nov. 2

"2. Assuming that the person involved in 1. above did file the prescribed oath on Nov. 5, 1950, may payment be made legally.

"(a) for the dates Nov. 3 and 4

"(b) for Nov. 5, and thereafter."
(Parenthetical addition ours)

O P I N I O N

It is assumed in this opinion that your request does not relate to any public employee who was on authorized leave on November 2, 1950, as Section 2 of the Loyalty Oath Act allows such persons 30 days from return to work in which to sign the oath.

1 (a). Your first question relates to payment of an employee who has not filed the oath, but continues in employment. It should be noted that on November 2, 1950, the written opinion of this office was given to the effect that, in the case of employees continuing to work after November 2, 1950, without filing the oath,

applicable procedure should be instituted forthwith to separate the employee from his employment.

The answer to this question is in the negative. Section 3107, Gov. Code, provides that no compensation nor reimbursement for expenses incurred shall be paid to any employee who has not taken and subscribed to the oath. For this purpose taking and subscribing the oath must be deemed to include filing it, since the paying officer has no evidence that the oath has been taken and subscribed, unless it has been filed. Filing is deemed to include the placing of the subscribed oath in the possession of the appointing officer or other officer having functions in the processing of such oath prior to filing.

1 (b) and 1 (c). The answer to all instances given in these inquiries is in the affirmative. On both relinquishment and resignation, the status of employee ceases on approval or acceptance by the appointing officer and the Civil Service Commission or its Director of the executed relinquishment or resignation. Payment after such time is not payment to an employee, but to a former employee. The payment is for services rendered prior to the requirement of a loyalty oath. This is true because Section 2 of the Act allows for the execution of the oath all of the period of 30 days to and including the date for which compensation or reimbursement is claimed, November 2, 1950. Compensation earned by a former employee during a period in which he was not required to execute the oath should not be withheld.

2 (a). If any employee files an oath on November 5, 1950, which was executed on or before November 2, 1950, he should be paid for service rendered on November 3 and 4. No time for filing the oath is specifically prescribed for a county or city employee. Section 3105, Gov. Code, which requires the filing of the oath as distinguished from the taking and subscribing of it, does serve as a guide in this regard, however. It provides that a state employee shall file the oath with the State Personnel Board within 30 days of the date on which it was taken and subscribed. It next provides that the county employee shall file the oath with the county clerk and the city employee with the city clerk, but without in either case specifying a time limit. It is reasonable to conclude, since a time limit is necessary to the administration of the Act, that the same time limit of 30 days from the date on which the oath was taken and subscribed is intended to apply to county and city employees as to state employees for whom it is first specified. The employee having signed and filed the oath within the time required by law, should therefore be paid for all time worked.

If, on the other hand, the oath, although filed November 5, was not signed until November 3 or 4, the employee should be paid for such time as he worked after signing the oath. It is assumed that he was not allowed to work on these days prior to the time of

the signing of the oath, but that employment had not in fact been terminated prior to the signing of the oath.

2 (b). The answer here is in the affirmative. It is true that the employee failed to sign the oath within the time required by law, but he was an employee at the time he signed it. The failure to sign on or before November 2, 1950, did not ipso facto work a forfeiture of position. It became the duty of the appointing officer at that time to take the necessary steps to dismiss the employee and the signing of the oath after the time required by law is not necessarily an answer to a charge of insubordination for failure to sign in accordance with law. Such a situation calls for the application of the reasonable discretion of the appointing officer. If the employee has signed, however, he is entitled to be paid for time worked in accordance with the foregoing responses to your inquiries.

You are therefore advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

WP

To: Mr. Harry D. Ross,
Controller.

No. 287

November 20, 1950

SUBJECT: HIGHEST PERSON ON LIST OF ELIGIBLES TO BE CERTIFIED, FOR POSITION OF DEPUTY CLERK, MUNICIPAL COURT, UNDER SECTION 6a OF THE MUNICIPAL COURT ACT.

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

> "We recently adopted a list of eligibles for Deputy Clerk, Municipal Court on which appears the names of three eligibles.
>
> "It is our understanding that under Section 6a of the Municipal Court Act it is not required that appointments shall be made from a list of eligibles containing not less than three names.
>
> "Mr. Slavich however has raised the point that if one person has been appointed from this list and only two names thereafter remain on the list, that some question may arise under section 18 of Act 5238 (Municipal Court Act), which requires at least three names shall be certified.
>
> "It has been our understanding that appointments to the Municipal Court of San Francisco are governed exclusively by section 6a of the Act, and that Section 18 does not apply.
>
> "Will you kindly advise us of your opinion."

O P I N I O N

Sections 6 and 6a of the Municipal Courts Act (#5238) apply specifically to cities of the first class, which is the classification of the City and County of San Francisco.

SLAVICH vs. WALSH
82 C.A. 2d 228

Section 6a was added in 1947, and thereafter amended in 1949, and presently provides in part as follows:

> "§ 6a. City and County of first class: Clerk, deputies and attaches. The judges of the municipal court in a city or city and county of the first class shall appoint one clerk who shall also act as secretary to the judges of said court, who shall receive a monthly salary of nine hundred dollars ($900). The clerk of the municipal court in a city or city and county of the first class shall appoint the following deputies and attaches who shall each receive as monthly compensation the sum set opposite the title of their respective offices or positions."
>
> (Thereafter are listed various positions of deputy clerk, with the salaries attached to these positions, and other positions not here involved.)
>
> " . . . In any city or city and county of the first class which has a civil service commission, whenever a position described in this section becomes vacant, the appointing officer shall request the civil service commission to certify to him for appointment the highest person on the list of eligibles of male or female sex as indicated in the request of the appointing authority."

It would thus appear that, whenever a position of deputy clerk would become vacant, the clerk of the Municipal Court would request the San Francisco Civil Service Commission to certify to him for appointment the highest person on the list of eligibles, in accordance with the provisions of Section 6a (supra).

Section 18 of the Municipal Courts Act, which section was last amended in 1931, provides in part as follows:

> "All vacancies in the office of clerk or marshal shall be filled by appointment by a majority vote of the judges. All vacancies in the clerk's office shall be filled by appointment by the clerk. All vacancies in the marshal's office shall be filled by appointment by the marshal, and it shall be competent for the marshal to appoint a deputy clerk or court clerk, ex officio a deputy marshal; provided, that no person so appointed shall receive any increased compensation by reason of such appointment. In any city or city and county which has a

civil service commission all appointments to fill vacancies as provided in this section shall be from among the three highest of those certified to the appointing officer by such civil service commission to be eligible to the office of the position to be filled."

The inquiry you ask is whether only the highest eligible on a deputy clerks' list of eligibles need be certified for appointment to a position of deputy clerk in the Municipal Court of San Francisco under Section 6a of the Act, or whether actually the three highest eligibles must be certified to the appointing officer for his selection of an appointee therefrom under the provisions of Section 18 of the Act.

It clearly appears that insofar as certification of deputy clerks from a list of eligibles is concerned for the Municipal Court in the City and County of San Francisco the provisions of Section 6a of the Municipal Courts Act control, and not Section 18. The reasons for this are: (1) The provisions of Section 6a (supra) deal specifically with cities of the first class (such as the City and County of San Francisco), and insofar as the subject matter covered thereby is concerned they control over the general provisions on the same subject matter as might appear in Section 18 supra; (2) Section 6a (supra) was adopted in 1947 and subsequently amended in 1949, and as a later amendment on the same subject matter as covered by Section 18 supra, (the language of which was never changed, so far as is here involved, from its original provisions of 1925), controls over Section 18, supra, insofar as San Francisco is concerned, and particularly where there may be any inconsistency in the respective provisions thereof.

SLAVICH vs. WALSH
82 Cal. App. 2d 228, 237

You are therefore advised that under the provisions of Section 6a of the Municipal Courts Act the Civil Service Commission need only certify to the appointing officer of the Municipal Court the highest person on the list of eligibles for the position of deputy clerk, and it is not required that appointments be made from a list of eligibles containing not less than three names.

Respectfully submitted,

DION R. HOLM
City Attorney

NSW

To: Mr. William L. Henderson
Personnel Director & Secretary
Civil Service Commission

No. 288

November 20, 1950

SUBJECT: HEALTH SERVICE SYSTEM, RULES AND REGULATIONS REGARDING EMPLOYMENT OF OUT OF STATE DOCTORS

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Recently certain rulings of the Health Service Board have been brought to my attention and have created some doubt in my mind as to the propriety thereof.

"I have been given to understand that the basic legislation pertaining to the Health Service System, contained in Section 172.1 of the Charter guarantees to city employees free choice of Doctors and hospitals but that the Health Service System Board has disregarded that guarantee by imposing a geographical limit with regard to choice of doctors and hospitals and extent of coverage.

"Section 172.1 of the Charter, Subdivision 3, provides in part, that 'Every member shall have the right to select, of his own choice, any duly licensed physician. . . or hospital . . . who or which will render the required services pursuant to said rules and regulations.' Also, that subdivision provides that any duly licensed physician . . . hospital or other agency of medical care shall have the right to furnish such services or medical supplies at uniform rates of compensation to be fixed by the Board.

"It would seem that the provisions quoted are a prohibition against any attempt of the Health Service Board to limit free choice of doctors or hospitals by any means, geographically or otherwise.

"By the Board's limiting the coverage to California, the insured is definitely forced to accept the medical services offered within a certain area regardless of whatever special services which might be advantageously offered and desired in other medical centers.

"If the Board has the power to limit the coverage to California, and the choice to California doctors, then it would follow that it has the power to limit such coverage and choice to San Francisco, or to a group within San Francisco, and free choice in fact would not exist.

"It may be that the limitations imposed by the Health Service Board are arbitrary, illegal, and an unwarranted

infringement on the personal rights of every American citizen to choose his own doctor and hospital so long as the hospital and doctor are willing to accept the uniform fees in compensation for the services they perform.

"Will you kindly furnish me with your opinion as to the propriety of the Health Service Board's action in imposing restrictions as mentioned above. Your compliance with this request will be greatly appreciated by the undersigned."

O P I N I O N

Subdivision 3 of Section 172.1 of the Charter recites the powers of the Health Service Board, which is charged with the duty of administering the Health Service System. The only portion of this subdivision which deals with the power to make rules and regulations is (c), which reads as follows:

> "(c) To make rules and regulations for the transaction of its business, the granting of exemptions and the admission to the system of persons who are hereby made members thereof and such other officers and employees as may voluntarily become members of the system with the approval of the board."

Nothing in this subsection gives the board the right to pass rules and regulations such as those quoted in your request.

Nowhere in Section 172.1 is there any express power to pass any rules and regulations concerning out of state doctors. In fact, subdivision (a) 1. of subdivision 3 contains the following language:

> ": . . every member shall have the right to select, of his own choice, any duly licensed physician, surgeon, . . . "

Therefore, I advise you that the Health Service Board does not have the authority to pass any rules or regulations which would in any way interfere with the free choice that the members have in the selection of their physicians, surgeons, or other person licensed to treat human diseases, whether within or without the State of California.

Respectfully submitted,

BJW

DION R. HOLM
City Attorney

To: Board of Supervisors
Attn: Supervisor P. J. McMurray

cc Office of the Mayor.
Health Service System

OPINION NO. 289

November 20, 1950

SUBJECT: APPLICATION OF SECTION 159, REVENUE AND TAXATION CODE, TO PERSONS IN THE ARMED SERVICES DURING THE PRESENT EMERGENCY.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "This office is in receipt of a request for information regarding moratorium of taxes as set forth in Section 159 of the Revenue Laws of California. This section grants certain exemption of penalties, interests, and costs to members of the armed forces in existing wars in which the United States is engaged.
>
> "Two questions arise on which we would appreciate opinions:
>
> "First: Is the United States at present at war?
>
> "Secondly: If so, what effect would Sec. 159 have upon an individual called to service after July 1, 1950, when his property had been sold to the State for taxes on June 30, 1950."

O P I N I O N

Section 159 of the Revenue and Taxation Code, which is referred to in your request, reads as follows:

> "Property owned during period of military service not subject to penalties, interest or costs: Refund: Application of section: Filing affidavit. As used in this section 'period of service' means the period beginning with the date of entrance of the individual involved into the service of the armed forces of the United States or September 16, 1940, whichever is the later, and ending six months after his separation from such service under conditions other than dishonorable or six months after the cessation of hostilities in existing wars in which the United States is engaged as declared by the President or Congress of the United States, whichever is the earlier.

"Property owned by, or in which an undivided interest of not less than 50 per cent is owned by, any individual is not during his period of service subject to any penalties, interest, or costs, and no penalties, interest, or costs accruing on such property during such period need be paid for any purpose.

"The amounts of any penalties, interests, and costs so accruing which have been and are hereafter collected shall, on order of the board of supervisors, be refunded as erroneously collected in the manner provided in Article 1 of Chapter 5 of Part 9 of this division, except that subdivision (b) of Section 5097 and Sections 5104 and 5106 shall not be applicable and a claim for refund based on this section may be filed within three years after the period of service or within three years after the date on which this section becomes effective, whichever is the longer.

"This section is applicable to property upon which the payment of taxes or assessments is delinquent, to tax sold property, and to tax deeded property and to the payment of taxes thereon and to the redemption thereof, including all of the procedures in Part 7 of this division.

"As a condition to the receipt of the benefits of this section the board of supervisors may require an individual to file an affidavit setting forth the facts bringing him within the terms of this section."

This section contains clear language indicating that it applies only where an actual war is being waged by the United States. No such war presently exists. The Constitution of the United States Article 1, Section 8, enumerates the powers of the Congress of the United States and amongst the powers recited therein is the right to "declare war". Congress has not made any declaration so far as the present international situation is concerned. In fact, the President of the United States and the leaders of Congress have emphasized, both in the public press and over the radio, the fact that our present action in the Korean area is a police action which was taken in support of our position in and promises to the United Nations.

Reading Section 159, quoted above, shows that the Legislature intended that the persons mentioned therein should be granted the immunities which it contains.

I realize that the man who is fighting in Korea cannot see any

distinction between himself and that of men who fought in World War II and who were given the benefits of this section. He has every reason to believe that he should be given the similar benefits at this time. However just may be the claims of these men and however fully I appreciate their feelings, I, like the courts, must advise you in accordance with the law as written by the Legislature.

There is no doubt in my mind that the situation presented in your request calls for remedial legislation in the immediate future and I presume that steps will be taken in order that the persons mentioned in your request may be given the benefit of the provisions of this statute.

Since the law as presently written makes no provision for its application at any time except during a war and, as I have indicated since there is no war in progress, I must advise you that this section would have no effect upon the case referred to in your request in question No. 2.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. Edward F. Bryant
Tax Collector
City Hall
San Francisco

BJW

OPINION NO. 290
November 20, 1950

SUBJECT: HAMILTON PLAYGROUND; USE OF 70 FOOT PORTION THEREOF FOR STREET PURPOSES; DIVERSION FROM PARK USES.

Dear Sir:

I have your request for an opinion as follows:

"The Department of City Planning has advised this Commission that the present plans for the Geary Express Way would include a right-of-way that would necessitate the use of a seventy foot strip along the entire south portion of Hamilton Playground.

"Would you kindly favor the Commission with an answer to the following:

"Can a seventy foot strip of the entire south portion of Hamilton Playground be legally used as a right-of-way for the Geary Express Way?"

O P I N I O N

The property now comprising Hamilton Square was reserved as a public square under the provisions of the Van Ness Ordinance (Order No. 822 and Order No. 845, Appendix Municipal Reports - 1867-68, pp. 588, 590, 591.) What now comprises the square was originally devoted to park purposes and on June 6, 1911, was turned over by the Park Commission to the Recreation Commission pursuant to then existing provisions of the Charter with the proviso that certain portions of the square fronting on Steiner Street and Scott Street be maintained as park and recreation areas. At the present time the portions of the square fronting on the aforementioned streets between Geary and Steiner Streets are planted with lawns and shrubbery and used for park purposes. The front footage on Steiner and Scott Streets devoted to park uses amounts to 275 feet on each street and under the plan set forth in your letter, it is contemplated that 28% of this area be taken for street purposes.

You have been previously advised by my predecessor in office that lands donated for and dedicated to park purposes may not be diverted to street uses. See opinion dated December 6, 1933, referring to Carl Larsen Park, and opinion dated August 10, 1945, referring to Balboa Park and the authorities cited in both opinions. Both the foregoing properties were privately donated for park uses and it is to be noted that dedications made by individuals are more strictly construed than those made by the public when a diversion from park uses is contemplated. (RITZMAN v. CITY OF LOS ANGELES, 38 C.A. (2d) 474; SPARKS v. CITY OF LOS ANGELES, 220 Cal. 366.)

However, despite the more liberal construction that pertains with reference to lands dedicated by the public to park purposes, there must be charter authority for any diversion therefrom. Again note the language in the case of HALL v. FAIRCHILD-GILMORE-WILTON CO., 66 Cal. App. 615, at page 624 (quoted in opinion dated August 10, 1945):

> "It may be said that the Board of Park Commissioners is entrusted by the City Charter with the management and control of the park property. . . . However, this Charter provision confers no authority upon the Board of Park Commissioners to destroy the subject of the trust or to devote it to use other than that of enjoyment and recreation. Its authority is merely that of a trustee invested with limited jurisdiction, having imposed upon it the duty to protect parks within its management and control, which should at the same time compel such board to protect, rather than instigate usurpation of authority over parks of the city by another body, or pass its trust property into the street department."

In the RITZMAN and SPARKS cases, supra, the diversion of lands dedicated to park purposes by the public to street uses was upheld on the basis of the authorization contained in the following language of the Los Angeles Charter, "provided, however, that the Board of Park Commissioners may, with the approval of the council, given by ordinance . . . authorize the opening, establishment and maintenance of streets, or other public ways in or through such parks."

The case of HUMPHREYS v. CITY AND COUNTY OF SAN FRANCISCO, 92 Cal. App. 69, involved the question of whether the use of a strip of land in Duboce Park 16 feet wide and 220 feet long for a street railroad and tunnel portal would be inconsistent with the purposes for which the park was dedicated. The court held that such use would not be inconsistent with park purposes based on the finding that the strip proposed to be taken was generally unfrequented by visitors to the park and that the proposed railroad and tunnel would in no wise obstruct the free and customary use of the park or any portion thereof by the public. The Supreme Court in its opinion after adverting to the foregoing finding by the trial court pointed out, p. 78:

> "While the expressed purpose for the construction of the Duboce tunnel was to facilitate transportation between two distant parts of the city, the construction of the tunnel and the street railroad leading thereto and therein would incidentally and to some extent at least be a medium of ingress, egress, and transportation, adding to the full enjoyment by the public of the privileges of the park."

If your commission could find as a matter of fact that the proposed widening for the Geary Express would "be a medium of transportation, adding to the full enjoyment by the public of the privileges of the park" such proposed use would be permissible under the authority of the HUMPHREYS case. In the absence of such a finding, in order that the proposed plan be accomplished, it would be necessary that there be a finding that the area proposed to be taken is no longer needed for park or recreational purposes and that there be an abandonment and discontinuance of its use for park purposes pursuant to the provisions of Section 41.1 of the Charter and The Park Discontinuance Laws of 1927 (Sections 38440-462 of the GOVERNMENT CODE) and in accordance with the procedure therein outlined.

Such action would not cause a reversion of such lands to private ownership, or cause the forfeiture of the ownership thereof in fee by the City and County of San Francisco. This basic problem was extensively considered in my opinion dated February 8, 1950, concerning Columbia Square to which you are hereby referred. The fundamental principles therein outlined for Columbia Square, both legal and historic, are equally applicable to Hamilton Square.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

TJB

To: Mr. Edward A. McDevitt, Secretary,
Recreation and Park Department.

cc: City Planning Commission;
Public Utilities Commission.

OPINION NO. 291

November 20, 1950

SUBJECT: SALVATION ARMY TRAINING SCHOOL - WHETHER LAND MAY BE USED FOR IN SECOND RESIDENTIAL DISTRICT UNDER PROVISIONS OF ZONING ORDINANCE.

Dear Sir:

This will acknowledge receipt of your request for an opinion, as follows:

"The Department of City Planning is in receipt of a request from The Salvation Army to use a portion of a block located in a Second Residential District for the purpose of building a Salvation Army training school for enlisted cadets. For your information we are enclosing herewith a plot plan of the area in question. Listed uses of the proposed structures to be erected on the parcel are shown below:

1. Administration Building

(a) Dining room with accommodation for 100; Kitchen with storeroom and Staff dining room with accommodation for 15 to 20.

(b) Chapel (Lecture Hall) seating 80 to 100 people, with stage.

(c) Class rooms (2) to accommodate 40 to 50 people.

2. Single Men's Cadet Unit

(a) Lounge and Library (combination)
(b) Class room (40)
(c) Prayer room
(d) Hospital room
(e) Rooms to accommodate 30 single men.

3. Single Women's Cadet Unit (40)

(a) Lounge and Library (combination)
(b) Class room (50)
(c) Prayer room
(d) Hospital room
(e) Rooms to accommodate 40 single women

4. Married Cadets' Unit

(a) Nursery
(b) Rooms for six to ten couples
(c) Hospital room

"In view of the fact that the two Opinions rendered in 1940 and 1949 by your office on this general subject are not applicable to this case, - the first covering elementary and secondary schools which comply with the provisions of the state compulsory education law, and the second covering only a specific case in question, - the Department of City Planning would appreciate having your office render an opinion as to whether the use proposed by the Salvation Army can be permitted in a Second Residential District under the provisions of the zoning ordinance."

O P I N I O N

You will note that the main activities to be conducted at the proposed institution fall within the definition of the term "school" as set forth in my opinion of August 29, 1949. With the school activities the institution will combine the features of a boarding house and, in an incidental and minor degree, some of the features of a health institution and day nursery.

As all the foregoing activities are permissible uses of property in a Second Residential District, you are advised that it is my opinion that the use proposed by the Salvation Army may be permitted on the land in question under the provisions of Section 4 of the Planning Code.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. Paul Oppermann
Director of Planning
City Planning Commission
100 Larkin Street
San Francisco 2

TJB

OPINION NO. 292

November 22, 1950

SUBJECT: LOYALTY OATH (SEE CH. 8 DIV. 4 TITLE 1 GOV. CODE), EFFECT OF CONTINUED MEMBERSHIP IN ORGANIZATIONS EXCEPTED.

Dear Sirs:

You have requested the opinion of this office as follows:

1. "We direct your attention to the prescribed oath, particularly the second paragraph thereof. In filing his loyalty oath an employee may list an exception therein, thereby asserting that he has been a member within the past five years of an organization that advocates the overthrow of the government by force or violence or other unlawful means. It is clear that if the employee is not now a member of such an organization no penalty attaches thereto. However, we are not clear concerning the status of an employee who subscribes to such an oath but who has not actually severed his membership in such an organization prior to the time he subscribes to the oath, and who is in fact at the time of subscribing to the oath, still a member of such an organization. In such cases is the employee liable to the penalty prescribed in section 3108 of the Act?

2. "Will you also advise us if compensation for such employees may be approved after November 2 if it is established that the employee is still a member of the organization which he lists as an exception in his oath."

O P I N I O N

1. An employee is in violation of the provisions of Section 3108, Gov. Code, if at the time of taking the oath he is a member of the organization excepted by him <u>if, and only if, that organization is in fact of the character described in the oath</u>.

If the organization does not in fact advocate "the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means," the mistaken listing of the organization as an exception does not change its character. Nor does the erroneous listing of the organization make it one of a character in which membership has been forsworn by the employee. Neither does such listing place the burden on the em-

ployee to prove the true nature of the organization. The listing of an organization by an employee does make it a proper subject of inquiry, by the appointing officer or other proper person, of the employee or otherwise, as to whether the organization is in fact of subversive character.

If the organization is of such character, and the employee was a member at the time of taking oath he is in violation of the provisions of Sec. 3108, Gov. Code, and subject to its penalties on conviction.

2. Compensation should be approved. This is true because the employee has taken the oath and the prohibition against payment or approval of payment of compensation, contained in Section 3107 applies only if the oath has not been taken.

If the appointing officer or other proper person ascertains that the organization listed, of which the employee continues to be a member, is actually of the character described in the oath, appropriate steps should immediately be taken in accordance with the charter to separate such employee from his municipal employment.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Civil Service Commission
151 City Hall
San Francisco

OPINION NO. 293
November 22, 1950

SUBJECT: REJECTION OF BID WHICH DOES NOT COMPLY WITH PLANS AND SPECIFICATIONS; EQUIVALENT ARTICLE; ABBOTT ELECTRIC COMPANY.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Attached is copy of letter dated Nov. 10, 1950, signed by Marvin C. Hix, Attorney, regarding the award of Contract under Specification No. 20,779 to R. Flatland in the amount of $34,408.00 instead of to Abbott Electric Company, whose bid was $33,331.50.

"In view of this letter, may the Controller legally certify the Contract to R. Flatland?"

I quote herewith letter of attorney Marvin C. Hix:

"On behalf of D. A. McMahon, a citizen and taxpayer of the City and County of San Francisco, I wish to protest the award of a contract under the above mentioned specifications, to R. Flatland for the installation of traffic control signals at isolated crossings in San Francisco for the sum of $34,408.00 as not being the lowest bid therefor, in that the Abbott Electric Co., I am informed, offered to do the work for the sum of $33,331.50, and in this respect the following specifications are made.

"1. The above numbered specifications provided that the 'controllers required . . . shall be General Electric Company's Type "F", "Future Interconnected Expansible Type, or its equivalent as determined by the Director"' of the Department of Public Works.

"2. The Abbott Electric Co. offered to supply a controller by the EAGLE SIGNAL CORPORATION, the largest manufacturer in the United States of traffic controllers, which the taxpayer contends and I believe, is the 'equivalent' of the General Electric Company's type 'F', mentioned in said specification.

"3. It has been contended that the Eagle controller cannot be set in positive steps of 1% of the time cycle, and for that reason is not an 'equivalent'. It is true that the manner of setting is different in each type, but the setting when made on the Eagle controller is just as positive as on the General Electric Type 'F', and it can be set not only in steps of 1% but less, if desired.

"4. It has also been contended that the Eagle controller does not have an automatic gear mesh, and therefore, is not an 'equivalent'. However, the Eagle Corporation's representative, prior to the award of the contract offered to furnish automatic gear mesh, if desired.

"5. It has also been contended that the split in time cannot be changed without shutting down the controller. In this there is a mistake, as the change in split can be made without shutting down the motor or controller, as a demonstration thereof will conclusively show.

"6. The Eagle controller will do everything that the General Electric Company's type 'F' will do, and just as well and efficiently, and is in every respect the 'equivalent' of the type 'F', mentioned in the specifications.

"7. I am informed that after the Director made the objections above mentioned, and prior to the award of the contract to R. Flatland, the Abbott Electric Company offered to supply the General Electric Company's type 'F' controller on the job instead of the Eagle controller and at same bid price, but that this offer was rejected and the contract awarded to R. Flatland at a price of nearly $1,110.00 more than the Abbott Co. was willing to do the work with the same controller as R. Flatland had offered to supply.

"While in using the following language, the taxpayer does not wish or intend to cast any personal reflections on the Director, he does, in the language of the courts, contend that the Director did not use sound judgment in deciding that the Eagle Controller is not 'equivalent', of the General Electric Company's type 'F' controller, and was therefore 'arbitrary and capricious' in making such award, and did not exercise sound discretion therein, and that consequently the award should have been made to the Abbott Electric Co., the low bidder by almost $1,100.00, and that the award to R. Flatland is void as not having made to the lowest bidder.

"By not mentioning it, the taxpayer does not wish to and does not waive the point that the Director does not have the right to specify a particular manufacturer's particular type of controller and then make specifications that in some small immaterial detail can be met only by this manufacturer's type when there is more than one type of controller on market in general use performing all functions required in such specifications."

O P I N I O N

Investigation has disclosed that in the opinion of the Director of Public Works the Eagle controller does not conform with the plans and specifications which were submitted to each bidder under the designation "Proposal for the Installation of Traffic Signals at Isolated Crossings (Sixth Contract)". According to the Director, the Eagle controller is not equivalent to the General Electric Company's Type "F" controller. Subsequent to the opening of bids, Mr. Abbott of the Abbott Electric Co., called upon the Director of Public Works and admitted that had he specified the General Electric Company's controller, his bid would have been higher than the next highest bid. He also stated that he did not know at the time that he made the bid and specified that he would furnish the Eagle controller that the Eagle controller did not comply with the plans and specifications. He stated that the agent for the Eagle controller had told him that the Eagle controller would meet the specifications. It was not until after the bids were opened that Mr. Abbott ascertained for the first time that the Eagle controller did not conform to the plans and specifications.

The plans and specifications under Item 14, listed on page 24, provide "The controllers required under this item shall be General Electric Company's Type 'F' 'Future Interconnected Expansible' type or <u>its equivalent as determined by the Director.</u>" As indicated above, the Director of Public Works has determined that the Eagle controller did not meet either with the plans and specifications outlined in the proposal for bids nor is the Eagle controller the equivalent of the General Electric Company's controller. This factual determination by the Director is now controlling. It may further be noted that previous to the letting of the bids all bidders were on an equal basis in that every bidder had the opportunity of providing a General Electric Company's controller.

The cases hold that a bidder must comply with all the requirements of the plans and specifications and may not propose a substitute. In MARYLAND PAVING COMPANY v. MAHOOL, 72 Atl. R. 833, at p. 834, the Court made the following pertinent observations:

> "Now, in answer to the first inquiry, it is only necessary to say that it is a rule of very general application, where reasonable requirements have been prescribed as to the manner of bidding, such requirements must be complied with, in order that a bid shall be entitled to consideration. While slight irregularities in a bid not affecting its substantial characteristics may be disregarded, yet the bid may be rejected for such reason, and the court will not interfere, in the absence of fraud or collusion. 20 A. & E. ENCY. OF LAW, 1167, 1168; WEED v. BEACH, 56 HOW. PRAC. (N.Y.) 470; PEOPLE v. CROTON, 26 Barb. (N.Y.) 241; WIGGIN v. PHIL., 2 Brewst. (Pa.) 444."

"On the contrary, it appears from the testimony of Mr. Fendall, the city engineer, that this provision in the specifications was not only a reasonable one, but was inserted for the benefit and for the protection of the best interest of the city. It is conceded that the appellant did not comply with the conditions of the specifications prepared and published by the city engineer in this respect, and, failing to so comply, we are of the opinion it had no right, under the authorities cited, to even have its bid considered by the board of awards. 28 CYC. 559; SMITH v. CITY, 2 Brewst. (Pa.) 443; CASE v. TRENTON (N.J. Sup.) 68 Atl. 58."

"In CHICAGO SANITARY DIST. v. McMAHON, 110 Ill. App. 510, it is distinctly held that it is not unlawful, where the lowest bidder has not conformed to the advertised requirements, to let the contract to the next lowest bidder. LOUCHHEIM v. CITY OF PHILADELPHIA, 15 Pa. Dist. R. 311; STATE v. CINCINNATI BD., 4 Ohio Cir. Ct. R. 76. While the requirement of a charter that a contract be awarded to the lowest bidder is mandatory, yet the authorities are uniform in holding that, in determining who is the lowest responsible bidder, the municipal authorities have a wide discretion, will not be controlled by the courts except for arbitrary exercise, collusion, or fraud, and they need not be guided in this determination solely by the question of the pecuniary responsibility of a bidder, but may consider his ability to respond to the requirements of the contract and his general qualifications to property execute the work. 28 CYC. 1031; KEOGH v. WILMINGTON, 4 Del. Ch. 491."

To the same effect:

SHIELDS v. CITY OF SEATTLE, 140 Pac. 353;

CHICAGO SANITARY DISTRICT v. McMAHON & M. CO., 110 Ill. App. 510;

BOSEKER v. WABASH CO., 88 Ind. 267;

LUPFER v. ATLANTIC CO., 87 N.Y. Eq., 491, 100 Atl. 927;

SCOLA v. BOARD OF EDUCATION, 77 N.J.L. 73, 71 Atl. 299;

CHIPPAWA BRIDGE CO. v. DURAND, 122 Wis. 85, 99 N.W. 603.

See also, STIMSON v. HANLEY, 151 Cal. 379, wherein the Supreme Court held it was proper to reject a bid which "was not in response to the invitation". To the same effect:

STATE EX REL. SHAW v. CITY OF TRENTON,
12 Atl. 902;

McGOVERN v. CITY OF TRENTON, 86 Atl. 539.

Mr. Hix, in his communication, suggests that the Director of Public Works does not have the right to specify a particular manufacturer's particular type of controller. It may be stated at the outset that the plans and specifications provide for a controller which will conform to requirements of certain traffic signals. Further provision is made that the controller be a General Electric Type "F" controller or its equivalent.

However, the courts have held that when all bidders are given the opportunity of furnishing a particular item, in this case the General Electric controller (Type "F"), the bidder may not later complain because he has agreed to furnish some other item. The Abbott Electric Company and all other bidders stood on the same footing as each bidder was given the equal opportunity of complying with the plans and specifications.

In the case of BECKWITH v. CITY OF NEW ROCHELLE, 245 N.Y.S. 21, the court stated:

> ". . . the competition contemplated by the charter was not prevented by the selection of amiesite, a patented article, for the resurfacing--this for the reason that said material was available to every bidder at the same price. WHITMORE, RAUBER & VICINUS CASE, supra; ADAMS v. VAN ZANDT (Sup.) 199 N.Y.S. 225; SAUNDERS v. CITY OF IOWA CITY, 134 Iowa, 132, 111 N.W. 529, 9 L.R.A. (N.S.) 392."

To the same effect:

INTERNATIONAL MOTOR CO. v. BLUMFIELD,
96 N.J.L. 364, 115 Atl. 391.

You are therefore advised that the Controller may legally certify the contract to R. Flatland.

Respectfully submitted,

DION R. HOLM,
City Attorney.

RJB

To: Mr. Harry D. Ross, Controller

cc: Mr. Sherman P. Duckel,
Director of Public Works.

Opinion No. 294
November 24, 1950

SUBJECT: INSTALLATION OF DIRECTIONAL SIGNS ON STREETS, STREET CARS AND BUSES FOR THE SAN FRANCISCO MUSEUM OF ART.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "As an institution partially supported by City funds, would we be entitled to directional street signs along arterial highways directing the public to this Museum (similar to those allowed the M. H. DeYoung Museum and the California Palace of the Legion of Honor of this city)? Similarly, would directional cards in the front of Municipal buses be feasible for us? You understand it is most difficult to operate a public service organization when the general public has difficulty in finding the institution."

O P I N I O N

In the first question propounded by your request relative to the placing of directional signs along the highways, the situation is covered by the following sections of the Police Code:

> "SEC. 690. AFFIXING ADVERTISEMENTS TO POLES, ETC., PROHIBITED. It shall be unlawful for any person, firm or corporation to paste, paint, affix or fasten, or cause to be pasted, painted, affixed or fastened on any telegraph, telephone, electric light or lamp pole, any advertisement, bill, notice, card, sign, or advertising device, excepting street or hospital signs for which permission must be obtained from the person, firm or corporation owning or controlling such poles, and from the Department of Public Works.
>
> "SEC. 695. POSTING, ETC., NOTICES, ETC., ON SIDEWALKS, ETC., PROHIBITED -- PERMISSION -- EXCEPTION. It shall be unlawful for any person, firm or corporation to paste, paint, affix or fasten, or cause to be pasted, painted, affixed or fastened on the sidewalk or roadway of any public street, any advertisement, bill, notice, card, sign, or advertising device, excepting street or hospital signs for which permission must first be obtained from the Department of Public Works."

Therefore, in answer to this question, I must advise you that without amendment to the Police Code, it would not be possible for you to install the signs on the arterials as you have indicated in

your request. In regard to the M. H. DeYoung Museum, referred to in your request, the Police Department informs me that these are all located in Golden Gate Park, which is under the Recreation and Park Commission.

In answer to your second question, I advise you that the installation of signs on street cars and trolley buses is a matter exclusively under the control of the Public Utilities Commission and the question of permission being granted to you should be taken up with it directly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

BJW

To: Mr. Robert M. Church, Curator
San Francisco Museum of Art
Civic Center
San Francisco 2, California

Opinion No. 295
November 27, 1950

SUBJECT: EFFECT OF PROPOSITION NO. 10 DEALING WITH HOUSING; SUBMISSION TO VOTERS OF PUBLIC HOUSING PROJECT.

Gentlemen:

I have your request for an opinion as follows:

"As you know, the voters at the election held on November 7, 1950, approved a State constitutional amendment which requires approval of a majority of the electors of a county or city, voting at an election, as a prerequisite for the establishment of any low-rent housing project by the State or other state public body.

"At the meeting of the Board of Supervisors held on November 13, 1950, Supervisor Christopher requested,with the concurrence of the other Board members, that the City Attorney inform the Board as to what effect the passage of said constitutional amendment, known as Proposition No. 10, will have with respect to local procedures relative to establishment of low-rent housing projects.

"The members of the Board will appreciate your early reply."

O P I N I O N

Prior to the addition of Article XXXIV to the California Constitution (which Article is entitled "Public Housing Project Law" and which is the Proposition No. 10 approved by the electors at the November 7, 1950 election), the San Francisco Housing Authority could proceed to develop and construct a low-rent housing project after the Board of Supervisors "approved said project by resolution duly adopted." (Sec. 8(b) of the HOUSING AUTHORITIES LAW; DEERING'S GENERAL LAWS, Act 3483.)

Article XXXIV makes it necessary that a majority of the qualified electors of San Francisco shall "approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election." (Article XXXIV, CALIFORNIA CONSTITUTION) The Board of Supervisors must now, therefore, in addition to itself approving the project, submit the project to the electors for their approval.

Article XXXIV became effective on November 7, 1950. (Art. XVIII, CALIFORNIA CONSTITUTION; JOHNSON v. WOLF, 208 Cal. 286, 289-90;

ROTH DRUG, INC. v. JOHNSON, 13 Cal. App. (2d) 720, 740-41.) It expressly excludes from its operation any low-rent housing project "where there shall be in existence on the effective date hereof, a contract for financial assistance between any State public body and the Federal Government with respect to such project." It is reliably reported from the office of William A. O'Brien, Attorney for the San Francisco Housing Authority, that the latter's contract with the Public Housing Administration in Washington, D.C., for financial assistance, covering the projected 3,000 units (Project Nos. Cal. 1-17, 1-18, 1-19) of low-rent housing in the Hunters Point area (approved by the Board of Supervisors on September 25, 1950, Resolution No. 10354) was executed and therefore in existence prior to November 7, 1950. Hence, that project need not be submitted to the electors.

Article XXXIV is declared to be "self-executing, but legislation not in conflict herewith may be enacted to facilitate its operation." Of course, no such legislation has yet been enacted.

For your further information, the full text of Article XXXIV is attached hereto.

Respectfully submitted,

DION R. HOLM,
City Attorney.

GEB

To: Board of Supervisors,
Attn: Mr. John R. McGrath, Clerk.

cc: Office of the Mayor.
Mr. William A. O'Brien.

ARTICLE XXXIV
PUBLIC HOUSING PROJECT LAW

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any State public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this Article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a State public body or to which the Federal Government or a State public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this Article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any State public body and the Federal Government in respect to such project.

For the purposes of this Article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the State public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

For the purposes of this Article the term "State public body" shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

For the purposes of this Article the term "Federal Government" shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America.

Section 2. The provisions of this Article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

Section 3. If any portion, section or clause of this Article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this Article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby.

Section 4. The provisions of this Article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith.

#296

November 28, 1950

SUBJECT: EXTENT OF EXEMPTION LIMITING LIABILITY FOR NEGLIGENCE UNDER SECTION 6005 OF THE WELFARE AND INSTITUTIONS CODE.

Dear Sir:

I am in receipt of your request for an opinion reading as follows:

> "Several years ago an attempt was made to secure a favorable ruling from the City Attorney's office to approve a provision on our admission form signed by the patient stating that in return for care received members of the medical and administrative staff of the San Francisco Hospital would be exempt from any liabilities, civilly or criminally, as a result of their admission and treatment. The City Attorney ruled that this could not be done as they could not sign away rights and privileges for something they had not yet received.
>
> "My purpose in calling this to your attention again has been brought up by a new part of the State law pertaining to the care and treatment of Psychopathic patients:
>
> "Chapter 1 of Part 3 of Division 6 of the Welfare and Institutions Code - Section 6005. 'Any superintendent or person in charge of the county psychopathic hospital, any public officer, public employee, or public physician who either admits, causes to be admitted, delivers, or assists in delivering, detains, cares for, or treats, or assists in detaining, caring for or treating, any person pursuant to this chapter shall not be rendered liable thereby either civilly or criminally.'
>
> "If the above provision can be enacted to the care and treatment of patients on the Psychiatric Service, would it be possible to obtain another ruling from the City Attorney as to whether or not the same ruling could not be applied to all patients in the San Francisco Hospital."

O P I N I O N

The Legislature enacted in 1949 by way of amendment, Section 6005 to the Welfare and Institutions Code relating to county psychopathic hospitals.

It is apparent that the exemption of liability therein

provided is limited to county psychopathic hospitals and is not applicable to all patients in county hospitals.

The Legislature has the power and could by proper legislation provide for a general exemption to include all patients in a county hospital if proceedings were taken to such an end. This the legislature did not do.

In conclusion therefore, the law as presently in force does not and cannot be applied to all patients in the San Francisco Hospital.

Respectfully submitted,

DION R. HOLM,
City Attorney.

SDL

To: Dr. J. C. Geiger,
Director of Public Health.

Thru: Mr. Thomas A. Brooks,
Chief Administrative Officer.

No. 297

November 28, 1950

SUBJECT: BUS OPERATORS, INCLUDING TROLLEY BUS OPERATORS, MUST FURNISH NAME AND ADDRESS FOLLOWING AN ACCIDENT.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"It has come to my attention that complaints have been made about some municipal bus operators because they furnish only their cap number following accidents, particularly property damage accidents. As a result of these complaints, Mr. Donald Mazzoni prepared a form which he furnished to all operating municipal railway employees, which form provides for furnishing the following:

Time of accident
Place of accident
Number of run
Number of street car, bus or trolley coach involved, and
Cap number of operator.

It does not contain the name and address of the operator.

"In this connection a further point has been raised and that is whether trolley coach operators should be given this form because the question has arisen as to whether or not trolley coaches are governed by provisions of the motor vehicle code.

"In view of the foregoing, I would appreciate receiving your opinion on the following queries:

"1. Is the information on the form referred to sufficient to comply with the requirements of the Motor Vehicle Code? Or should the operators furnish their names and addresses?

"2. Are trolley coaches governed by the provisions of the Motor Vehicle Code?"

O P I N I O N

I reply to your queries as follows:

1. Sections 481 and 482 of the Motor Vehicle Code provide that the driver of any vehicle involved in an accident shall give his name and address and registration number of the vehicle he is driving. Therefore, an operator involved in an accident should furnish his name and address in addition to the information given on the form referred to in your request.

2. Section 452.5 of the Motor Vehicle Code subjects trolley coaches to many provisions of that code, and particularly to Sections 481 and 482 dealing with furnishing the name and address of the operator involved in an accident.

Very truly yours,

DION R. HOLM, City Attorney.

TO: WILLIAM H. SCOTT, Manager,
Municipal Railway
2600 Geary Boulevard
San Francisco 18

CWD

Opinion No. 298
December 4, 1950

SUBJECT: BOARD OF SUPERVISORS, POWER TO CONSIDER STIPULATIONS ON APPEAL FROM CITY PLANNING COMMISSION.

Gentlemen:

This office is in receipt of your request for an opinion which reads as follows:

"The Board of Supervisors has before it at the present time an appeal from a decision of the City Planning Commission by its Resolution No. 3843, which denied application to rezone property located on the west line of Mission Street south of Onondaga Avenue from First Residential District to Commercial District.

"The Board has been informed that the application for rezoning, which was made to the City Planning Commission, was accompanied by proposed stipulations concerning the use to which the property affected would be put. However, the Commission rejected the proposed stipulations and denied the application and therefore the only matter now before the Board of Supervisors is an appeal from the Commission's denial of the application to rezone, since the stipulations mentioned were not acted upon by the City Planning Commission.

"The Board will again consider said appeal at its meeting to be held on Monday, December 4, 1950, and it respectfully requests that you favor it on or before that date with your written opinion as to whether the Board may properly consider the proposed stipulations in conjunction with its consideration of the denial of the rezoning application. In other words, is it possible for the Board to exact from the applicant stipulations similar to those which were proffered to the City Planning Commission, or is there any manner in which the applicant's appeal could be sustained while at the same time legal effect could be given to the proposed stipulations which were rejected by the City Planning Commission."

O P I N I O N

The power of the Board of Supervisors to hear appeals from decisions of the City Planning Commission concerning matters involving zoning appears in Section 117 of the Charter, the pertinent part of which reads as follows:

". . . that the commission, after hearing shall, by resolution, approve or disapprove the proposed change which, if

approved, shall not become effective for thirty days; that appeal may be taken from the ruling of the commission by filing written protest with the board of supervisors, and if such protest is subscribed by the owners of twenty per cent of the property affected, the supervisors shall fix a time and a place for hearing such objections which shall be not less than ten nor more than thirty days after such filing, and must decide thereon within ten days of the start of such hearing; that the supervisors, by not less than two-thirds vote, may disapprove the action of the commission, . . ."

It is evident that the Board of Supervisors is limited in what it can do concerning appeals taken from matters involving zoning. In your request, in effect you are asking: Can the Board disapprove the action of the Commission and recognize certain stipulations concerning the use to which the property is to be put without having had such stipulations submitted to them as part of the original decision of the City Planning Commission?

The Charter provisions are not grants of power but are limitations on the powers of the Board of Supervisors in municipal affairs. The residual power of the City in municipal affairs is in the Board of Supervisors unless it is delegated to some other commission by a provision in the Charter or is limited by other provisions of the Charter.

The language of the Charter in Section 117, supra, is a definite limitation on the residual power vested in the Board of Supervisors concerning matters on appeal from the planning commission. The section delegates jurisdiction of applications for zone changes to the City Planning Commission with the sole provision that the resolution of the City Planning Commission approving or disapproving the change requested is, on proper protest, subject to the disapproval of the Board of Supervisors. The Board of Supervisors must act in accordance with this restriction and cannot by its own action enlarge the power given to it concerning the review of appeals from the City Planning Commission regarding zoning matters.

You are therefore advised that the Board of Supervisors may not exact from the applicant stipulations similar to those which were proffered to the City Planning Commission, nor may the Board in any way give legal effect to these stipulations when considering and ruling on this appeal.

Respectfully submitted,

DION R. HOLM,
City Attorney.

BJW

To: Board of Supervisors,
Attn: Mr. John R. McGrath, Clerk.

cc: Office of the Mayor;
City Planning Commission.

OPINION NO. 299

December 4, 1950

SUBJECT: RIGHT OF MEMBER OF BOARD OF EDUCATION TO MAINTAIN HIS POSITION ON BOARD OF EDUCATION AND ACT AS ASSISTANT ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AT THE SAME TIME.

Dear Sir:

This office has been requested to render an opinion as to whether a member of the Board of Education may maintain his position on the Board and at the same time act as Assistant Attorney General of the State of California.

OPINION

Section 142 of the Charter of the City and County of San Francisco provides as follows:

> "Any person holding a salaried office under the city and county, whether by election or appointment, who shall, during his term of office, hold or retain any other salaried office under the government of the United States, or of this state, or who shall hold any other salaried office connected with the government of the city and county, or who shall become a member of the legislature, shall be deemed to have thereby vacated the office held by him under the city and county."

At the outset it will be necessary to determine whether a member of the Board of Education holds a salaried office within the definition of Section 142 of the Charter.

Section 134 of the Charter dealing with the compensation paid members of the Board of Education reads as follows:

> "The compensation of each member shall be fifteen dollars ($15) per day when the board is in session and ten dollars ($10) per day when engaged in committee work under the direction of the board, provided that the total amount of such session and committee work for the whole board shall not exceed six thousand dollars ($6,000) for any fiscal year,

and that only those actually attending a session or doing such committee work shall be entitled to compensation therefor."

It has been repeatedly held that compensation paid for particular services rendered at irregular and uncertain periods is a "fee", while a "salary" is a fixed compensation based on services for definite and regular periods of time. The term "fee" and the term "salary" have been held not to be synonymous.

The Attorney General of the State of California had occasion to determine this same point in his opinion No. 46-334 rendered on December 9, 1946, 8 OPS. CAL. ATTY. GEN. page 281. On page 284 the following observation was made:

"In 46 CORPUS JURIS 1017 the terms 'salary' and 'per diem' are defined respectively as follows:

"'a. SALARY. A "salary" is a fixed compensation, decreed by authority, and for permanence, and is paid at stated intervals, and depends upon time, and not the amount of the services rendered.

"'c. PER DIEM ALLOWANCE. Where a statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to a per diem compensation for that day.'

"A distinction exists between per diem compensation and salary, in the original or strict sense of the latter term. This distinction has been discussed in a number of cases and texts, particularly in GALLEEN v. HONEYCUTT, (1916) 173 Cal. 100, 159 Pac. 595, and 1 A. L. R. 276. In the case of GABRECHT v. CINCINNATI, 51 Ohio St. 68, 36 N. E. 782, per diem compensation of officers was held not to constitute salary in the strict sense; also see BIGLEY v. BELLEVUE, 158 Pa. 495, 497, 28 Atl. 23. In the case of NIX v. DEPT. OF LABOR & INDUSTRY, (1936) 186 Wash. 651, 59 P. 2d 740, the term 'salaried officer' was limited to an officer under a continuing employment, on a definite salary, and did not include those whose services were sporadic.

"Giving the language used in Rule 114(b) its ordinary meaning, as indicated by the foregoing authorities, and reading it in the light of its context and

the evident purpose sought to be accomplished by the Legislature, we cannot escape the conclusion that the word 'nonsalaried' is used in its original and strict sense to signify an officer who does not receive a fixed annual or periodical payment, but rather one whose pay varies with the amount of services rendered. We are, therefore, of the opinion that members of boards receiving a per diem are not to be considered as salaried members but should be considered nonsalaried members for the purpose of Rule 114 of the Board of Control."

See also Opinion No. NS4928 released June 4, 1943, 1 OPS. CAL. ATTY. GEN. page 536. To the same effect are the following decisions of appellate courts:

STATE EX REL v. FROHMILLER,
46 Ariz. 413, 52 Pac. (2d) 483;
CRAWFORD v. BICKFORD,
23 Fla. 404, 2 So. 782, 783;
McNAIR v. ALLEGHENY CO.,
328 Pa. 3, 193 Atl. 118;
OSBORNE v. HENRY,
200 Ala. 353, 76 So. 119, 121;
STATE v. BLAND,
91 Kan. 160, 136 Pac. 947, 950;
BLICK v. MERCANTILE TRUST & DEPOSIT CO.,
113 Md. 487, 77 Atl. 846;
STATE EX REL v. PATTERSON,
152 Mo. App. 264, 132 S. W. 1183;

COCHISE COUNTY v. WILCOX
127 Pac. 758, 759.

It will be further observed that not all members of boards or commissions are excluded from holding or retaining a salaried office by virtue of the provisions of Section 142 of the Charter, For example, the commissioners of the Recreation and Park Department, Library Department, Art Department and the War Memorial trustees do not receive any compensation. They, therefore, would be entitled to hold salaried offices under the government of the United States or this state. It is evident, therefore, that when the word "salaried" was used in Section 142 of the Charter it was not intended to apply to members of the Board of Education, but only to persons who hold salaried offices as hereinbefore defined.

It will now be necessary to consider whether the office of member of the Board of Education is incompatible with that of Assistant Attorney General. The incompatibility which must be present was defined in the case of PEOPLE v. GARRETT, 72 Cal. App. 452, at 455, in the following words:

> "The doctrine arising from attempts by single individuals to exercise the functions of incompatible offices springs out of considerations of public policy. (Mechem on Public Officers, sec. 422; 22 R. C. L., title 'Public Officers,' sec. 55; BRYAN v. CATTELL, 15 Iowa 538; STATE v. BUTTZ, 9 S. C. 156; STATE v. JONES, 130 Wis. 572, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696, 8 L. R. A. (N. S.) 1107, 110 N. W. 431; STATE v. WAIT, 92 Neb. 313, 43 L. R. A. (N. S.) 282, 138 N. W. 159; STATE v. WITTMER, 50 Mont. 22, 144 Pac. 648, such considerations arising naturally from the view that two offices cannot be held by one person when, from the divergent character of the offices, the public interest will suffer thereby. In a leading case which deals with the doctrine the following dogmatic and apparently exclusive language is employed; 'Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court - officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of Bryant (4 T. R. 715, and 5 Id. 509), cited by appellant, does not conflict with this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se have the right to interfere, one with the other, before they are incompatible at common law' (PEOPLE v. GREEN, 58 N. Y. 295, 304). It is not meant by this decided language that offices will not be incompatible unless they fit or

come within some expression contained in the language quoted. 'It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatible offices' (22 R. C. L., title 'Public Officers,' sec. 55). 'It seems to be supposed that, in order to render two offices incompatible, there must be some such relation between them as that of master and servant - that the one must have controlment of the other, or that the one must be charged with the duty of auditing or supervising the accounts of the other, or that the one must be chosen by or have the power of removal over the other."

The court in LEYMEL v. JOHNSON, 105 Cal. App. 694, had occasion to determine whether the position of instructor in the Fresno High School was incompatible with that of being a member of the state legislature. The court held, in the course of its opinion, that there was nothing incompatible with the two offices.

This same subject was treated in HERMAN v. LAMPE, 195 S. W. 122, at page 126, wherein the court held:

"This seems to be a sound rule to be adopted in determining whether an employment which one accepts is incompatible with the duties of an office which he holds. The answer alleges, substantially, that the duties of the employment, which appellant received from the city of Bellevue, did not interfere with and was not inconsistent with the duties of the office of commissioner of Newport; that they were not subordinate to each other in a way that would produce a presumption that the duties of both could not be executed with impartiality and honesty; and further, that the multiplicity of business was not such that he could not execute both the functions of the office and the duties of the employment with care and ability."

It is quite evident under the decisions hereinbefore quoted that there is no incompatibility between the office of a member of the Board of Education and that of Assistant Attorney General.

You are therefore advised that one may be a member of the Board of Education and at the same time act as Assistant Attorney General of the State of California.

Respectfully submitted,

DION R. HOLM
City Attorney

RJB:

To: Mr. Irving Breyer
Legal Adviser
Board of Education

No. 300

December 4, 1950

SUBJECT: PAYMENT OF SALARY AND EXPENSES THROUGH NOVEMBER 2, 1950 DUE EMPLOYEE DISMISSED FROM SERVICE AFTER REFUSAL TO SIGN LOYALTY OATH

Dear Sir:

You have requested an opinion of this office in response to the following inquiry:

> "May payment be made legally after Nov. 2, for earnings or expenses to and including Nov. 2, 1950 where the person has been dismissed from the service for having failed to take the prescribed oath."

O P I N I O N

Payment may be made when the order of dismissal becomes final, in accordance with the several provisions of the Charter relating to positions in the City and County service.

At such time it may be said that the City and County has determined through its authorized procedure that the status of employee has terminated.

There is no prohibition in the Act requiring a loyalty oath to the payment to a former employee of salary or expenses owing for a period prior to November 3, 1950.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM
City Attorney

WP

To: Mr. Harry D. Ross, Controller

No. 301

Dec. 6, 1950

SUBJECT: SECTIONS 2203 AND 13203 OF THE EDUCATION CODE: AUTHORITY OF BOARD OF EDUCATION TO DIRECT PERFORMANCE OF SERVICES UNDER SECTIONS; HILLSMAN CASE.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Please refer to the above referenced opinion.

"You quote Section 2203 of the Education Code. Where this section refers to 'when performing services directed by the board,' is it correct to interpret this to mean services authorized by the board under authority of the Education Code or other law?

"You also quote Section 13203 of the Education Code. Where this section refers to 'when performing services for the district under the direction of the governing board,' is it correct to interpret this to mean services authorized by the Education Code or other law? Where section 13203 refers to 'appertaining to the duties of the employee or any question of interest to the school district,' is it correct to interpret this to mean the character of the convention or conference to be attended or the schools to be visited is accordingly restricted?"

O P I N I O N

I find it impossible to give categorical answers to the general questions propounded in your request.

The "services" contemplated by Sections 2203 and 13203 of the Education Code have never to my knowledge been judicially circumscribed to services authorized under any particular law and from the nature of the case they do not seem susceptible to any such precise delineation. It appears to me that the sections contemplate any services within the power of the board to authorize no matter what the derivation of the power may be. Necessarily, the legality of each authorization by the Board under the sections must be determined from the particular facts considered in connection with all related law.

The Board of Education has those express powers and duties conferred and imposed by the charter and the Education Code and also those implied powers necessary to effectuate its express powers and to enable it to properly function as the

governing body of the school district. (Sec. 2 201 Education Code; Sec. 135 San Francisco Charter; 23 Cal.Jur. pp. 90-96; WARD v. SAN DIEGO, 203 Cal. 712, 718; RICHARDSON v. BOARD OF EDUCATION, 6 Cal. (2d) 583; GABRELLI v. KNICKERBOCKER, 12 Cal. (2d) 85).

Adverting to the particular subject matter of my opinion of July 21, 1950 you will note that under Section 2204 of the Education Code the Board has power to:

(a) "Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction."

You will further note that Section 1007 of the Education Code provides:

> "The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within (90) days after the accident has occurred."

The foregoing laws may be taken as the legal predicate for the Board's authorization and direction to Mr. Hillsman. Pursuant to its authority and for the protection of the district the Board has adopted a rule to the effect that all student activities on school time be properly supervised. When and how that supervision should be exercised are matters that must necessarily be left to the Board's discretion. This discretion, of course, must be properly exercised and cannot be abused.

In the instant case it appears from Mr. Breyer's letter that the Board felt that a possible liability might attach to the school district for the activities of the students on the trip if they were not properly supervised as they were on school time and had been authorized to make the trip. It therefore directed Mr. Hillsman to accompany the team for the purpose of supervising its activities. There appears to be a reasonable basis for the Board's determination, and on these facts I find no abuse of discretion indicated. The services having been properly authorized and performed pursuant to the Board's direction it was and is my opinion that Mr. Hillsman can be legally reimbursed for his traveling expenses.

With reference to the question contained in the last sentence of the second paragraph of your letter, it does not appear from your letter that there is any specific problem before you at the present time calling for an interpretation of the language set forth. If you have such a problem kindly let me know the particular facts and I shall be pleased to render my opinion thereon.

Respectfully submitted,

DION R. HOLM
City Attorney

TJB

To: Mr. Harry D. Ross
Controller City and
County of San Francisco
City Hall

OPINION NO. 302

December 8, 1950

SUBJECT: CHINESE RECREATION CENTER; VALIDITY OF WORK ORDER OF PETERSEN CONSTRUCTION COMPANY IN CONNECTION WITH DESTRUCTION OF BRICK WALL ON THE SITE.

Gentlemen:

This refers to your request for an opinion concerning the validity of a work order dated November 24, 1950, submitted by H. L. Petersen Construction Company, for the payment of an additional sum of $7,386.85, in connection with the construction of the Chinese Recreation Center.

A brick wall on the site has been destroyed and this sum represents the cost of the removal of debris, excavation, cribbing to retain the earth while a wall is to be constructed, etc. This brick wall was to have been utilized according to the plans and specifications of the contract as a facing for a new wall to be constructed on the site.

O P I N I O N

Hardship, additional expense or unforeseen difficulties existing in the performance of the terms of a contract, are, in general, no excuse for non-performance of the terms of a contract. The contracting party is not entitled to additional funds for the performance of such a contract. CARLSON v. SHEEHAN, 156 Cal. 693. However, it is the principle in the law of contracts as follows:

> "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of . . . a condition or state of things to which it relates, subsequent perishing of the thing, or cessation of the existence of the condition will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified." 17 C.J.S. 956. See also 6 CAL. JUR. 445.

Whether the parties so contracted is a mixed question of law and fact. The plans and specifications under which this contract was bid and accepted and which are part of the contract call specifically for the erection of a wall on the site using this brick wall as a facing. In the absence of circumstances negativing a contrary conclusion, it would appear that the continued existence of the brick wall was contemplated by the contracting parties as the basis for the performance of this part of the contract.

To the rule above stated there are several exceptions. The destruction of the brick wall cannot be considered a legal excuse for non-performance, where the destruction of the wall is through the fault of, or is a liability and responsibility assumed by the contractor. In this connection your attention is called to page 1.2 of the contract which provides as follows:

"1-08. Shoring, bracing, or other means as necessary, shall be provided by Contractor as follows:

"(a) To protect footings and foundations of adjacent buildings from undermining or settling of walls.

"(b) To protect footings and foundations of retaining walls and side walks from undermining or settling.

"(c) To prevent caving or erosion of excavations."

In the absence of proof of circumstances negativing a contrary conclusion or proof that the collapse of the wall caused by other factors, even though the contractor has fully performed these provisions, the above quoted provisions, and in particular 1-08(b), appear to control the rights of the parties and the contractor should not be able to claim that the continued existence of the wall was a matter contemplated by both parties as a necessary incident to the performance of the contract.

It is my opinion, therefore, subject to the qualifications above stated, that the Petersen Construction Company will be

performing what it is already bound to do under the contract under the work order and extra compensation provided in the order is not supported by consideration.

Respectfully submitted,

DION R. HOLM
City Attorney

To: Recreation and Park Commission
Attention: Mr. George Harmon
Supervising Engineer

TMO'C

No. 303

NO OPINION NO.303 ISSUED

Opinion No. 304

December 12, 1950

SUBJECT: VALIDITY OF CERTAIN PARK-RECREATION CONTRACTS IN VIEW OF NATIONAL PRODUCTION AUTHORITY ORDER NO. M-4, EFFECTIVE OCTOBER 27, 1950.

Dear Sir:

This office is in receipt of your request for opinion as follows:

"National Production Authority Order No.M-4 issued effective October 27, 1950 has created certain problems regarding the certification of Recreation and Park Department contracts.

"Specifically I am holding the following contracts pending determination as to whether performance thereunder would be in violation of Order No. M-4.

"1. Contract with William McIntosh and Son for the construction of seating facilities at 'Big Rec' in Golden Gate Park, San Francisco.

"Bids were received on August 29, 1950 and the contract was awarded on September 14, 1950. The agreement was entered into on September 22, 1950.

"2. Contract with Ferguson Bros. for the construction of drainage corrections and installation of ejector pumps in Golden Gate Park, San Francisco.

"Bids were received on October 17, 1950 and award was made on October 19, 1950. The agreement was entered into on October 26, 1950.

"3. Contract with Ferguson Bros. for the installation of an irrigation system for the Herbert Fleishhacker Playfield, San Francisco.

"Bids were received on October 17, 1950 and award was made on October 19, 1950. The agreement was entered into on October 26, 1950.

"4. Contract with Love and Haun for the construction of sidewalks and curb at Fleishhacker Playfield and San Francisco Zoological Garden, San Francisco.

"Bids were received on October 10, 1950 and the contract was awarded on October 31, 1950. The agreement was entered into on November 9, 1950.

"In view of the restrictions imposed by National Production Authority Order No. M-4 please favor me with your opinion regarding;

"(a) can the above mentioned contracts be legally entered into, and;

"(b) can the Controller legally certify same.

"I am enclosing a copy of Order No. M-4 for your convenience."

O P I N I O N

Section 22.4 of the National Production Authority Order No. M-4 provides as follows:

"Prohibited Construction. Except as permitted in §22.5, no person shall, after the date of this part, commence construction of any building or structure to be used for or in connection with any of the purposes specified, as set forth in §22.12 (List A)."

Section 22.3 (b) defines "Construction" as follows:

"'Construction' means the erection, construction, reconstruction, restoration, or remodeling of any building, structure, or project, or additions thereto or extensions or alterations thereof."

Section 22.3 (c) defines "Commence construction" as follows:

"'Commence construction' means to incorporate into a building or other structure materials which are to be an integral part of the building or structure in question. ....."

1. Contract with William McIntosh and Son for the construction of seating facilities at "Big Rec" in Golden Gate Park, San Francisco.

Unless construction was commenced prior to October 27, 1950, the performance of this contract was rendered illegal by the provisions of Order No. M-4. Section 22.12 (List A) specifically lists "Bleachers and seating arrangements" and "Grandstands" as construction which is prohibited.

2. Contract with Ferguson Bros. for the construction of drainage corrections and installation of ejector pumps in Golden Gate Park, San Francisco.

3. Contract with Ferguson Bros. for the installation of an irrigation system for the Herbert Fleishhacker Playfield, San Francisco.

4. Contract with Love and Haun for the construction of sidewalks and curb at Fleishhacker Playfield and San Francisco Zoological Garden, San Francisco.

The purpose of the construction of the contracts listed above as Nos. 2, 3 and 4 is within the prohibited use or purposes contained in Section 22.12 (List A), to-wit:

"Any other recreational, amusement or entertainment purposes, whether public or private."

The question in these contracts is whether the installation of ejector pumps, the installation of irrigation

system, and construction of sidewalks and curbs are "buildings" or "structures" within the meaning of Section 22.4. It is to be noted also that Section 22.3 employs the word "project." The word "structure" is a broad, generic term and, in general, includes any thing constructed or built, and has been judicially defined as including a street, water mains, sewer (See: 40 Words & Phrases, permanent edition, p. 323). In the absence of further clarification of Order No. M-4 of the National Production Authority or further facts concerning the nature of the work to be performed, it would appear that the work specified in each of these contracts would come within the definition of the word "structure." Provided that the work under these contracts is commenced after October 27, 1950, the performance of each contract would appear to be made illegal by the provisions of Order No. M-4.

****** ****** *** ****** *****

With regard to all the above mentioned contracts, it is to be noted that Order No. M-4 in Section 22.5 provides for exemptions. It is assumed that none of the contracts comes within the terms of any exemption. It is also to be pointed out that Section 28 of Order No. M-4 provides for requests for adjustments or exceptions by any person to the National Production Authority on the ground that any provision works a hardship upon him not suffered generally by others in the same trade or industry or that its enforcement against him would not be in the interests of national defense.

In answer to your specific questions:

1. There is no prohibition in Order No. M-4 against the creation of the contracts. It is performance which may or may not be rendered illegal under Order No. M-4 if the construction is prohibited, no exception is made, and construction commences after October 27, 1950.

2. A certification of the contracts may be made without legal liability. Under Section 86 of the Charter, a certification would not amount to a concurrence or agreement

to an illegal performance of the contract, but is as to availability of funds "to pay the amount of the expenditure when it becomes due and payable."

Very truly yours,

DION R. HOLM, City Attorney.

TO: HARRY D. ROSS, Controller of
the City and County of
San Francisco
109 City Hall, San Francisco 2

TMO'C

Opinion No. 305

December 29, 1950

SUBJECT: RE USE OF RECREATION BOND FUNDS FOR BALBOA PARK BASEBALL DIAMOND.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Staff consideration is presently being given to the construction in Balboa Park of two baseball diamonds, a project involving considerable grading. An informal estimate is that this project might cost in the neighborhood of $20,000.
>
> "Will you please advise us as to whether this department can legally use Recreation Bond funds for the above-mentioned purpose."

OPINION

Resolution No. 7737 (Series of 1939) embracing the Recreation Bond issue of 1948 provides in part as follows:

> "Section 2. That bonds of the City and County of San Francisco authorized at said election held therein on the 4th day of November, 1947, in the aggregate principal amount of $12,000,000, to be known as 'City and County of San Francisco Recreation Bonds - 1947', shall be issued from time to time to fund the acquisition, construction and completion of the municipal improvements set forth in the following proposition, to wit: $12,000,000 to pay the costs of the improvement and enlarging of existing playgrounds and recreation centers and the acquisition of lands and the improvement of lands for existing and new playgrounds and recreation centers, the construction of buildings and acquisition of equipment and facilities consisting of gymnasiums, swimming pools, athletic grandstands, club rooms, kitchen and sanitary facilities, lighting

"apparatus and other works, properties or structures necessary or convenient for public playgrounds and recreation centers, within and without the City and County of San Francisco."

It is apparent that baseball is a well-recognized form of recreation. The bonds were voted to provide, among other things, for "the improvement of lands for existing and new playgrounds and recreation centers." As pointed out in Opinion No. 62, September 6, 1949:

"(d) The new commission would have discretion after the funds were voted to apply them to any purpose in keeping with the intent of the bond proposal. The funds could be used upon property presently owned and operated by the now existing Recreation Commission, and also upon any property acquired by purchase or otherwise, if the use of the property was for a recreational purpose."

It is my opinion, therefore, that your department can legally use Recreation Bond funds for the construction of two baseball diamonds at Balboa Park. It is suggested when allocating funds for the baseball diamonds that the area be designated as a recreation center.

Very truly yours,

DION R. HOLM, City Attorney.

TO: MR. WILLIAM SIMONS,
Executive Secretary to the
General Manager, Recreation
and Park Commissioners
McLaren Lodge, San Francisco 17.

EFD

Opinion No. 306

December 15, 1950

SUBJECT: WHETHER EMPLOYEES AT AQUATIC PARK MAY RENDER SERVICES AT OTHER LOCATIONS OR WHETHER THEY MUST GIVE THEIR FULL TIME TO THE SAN FRANCISCO MARITIME MUSEUM ASSOCIATION.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"At its meeting held on November 20, 1950, the Board of Supervisors finally passed an ordinance approving an agreement between the Recreation and Park Commission and the San Francisco Maritime Museum Association, providing for the occupancy and use of a portion of the Aquatic Park building and area for maritime museum purposes.

"The agreement provided in part, 'The Recreation and Park Commission shall furnish the maintenance staff for the leased area which shall constitute: 2 janitors, 1 janitress, 1 engineer, 1 watchman.'

"In connection with the agreement, Supervisor Fazackerley respectfully requests that you favor him with your written opinion as to whether the service rendered by said employees is limited to the leased areas, or whether it may be rendered elsewhere at the discretion and under the jurisdiction of the Recreation and Park Commission.

"Supervisor Fazackerley will appreciate your early advices in this matter."

O P I N I O N

The pertinent portion of the agreement which was entered into on the 14th day of September, 1950, between the Recreation and Park Commission on behalf of the City and County of San Francisco and the San Francisco Maritime Museum Association, Inc., will be found on page 2 of the agreement. It reads as follows:

"1. The Recreation and Park Commission shall furnish the maintenance staff for the leased area, which shall constitute:

2 janitors
1 janitress
1 engineer
1 watchman

"2. The hours of the employees will be determined through mutual agreement between the association and the General Manager with the express understanding that the City shall not be liable for any overtime work."

It will be noted that the agreement provides that "the hours of the employees will be determined through mutual agreement between the association and the general manager." The general manager is identified in the agreement as the general manager of the Recreation and Park Department. It is the evident intent of the agreement that the employees mentioned therein which are to be furnished as a maintenance staff for the leased area should be employed only on a part time basis. Had the intention been otherwise, the hours of the employees would have been set out specifically in the agreement. The general manager therefore has the discretion to determine the number of hours each employee should be assigned to the leased areas in any given week. These hours must be concurred in by the association.

You are therefore advised that the services rendered by the employees of the leased area are not limited to said area, but said employees may be required to render services elsewhere at the discretion and under the jurisdiction of the Recreation and Park Department.

Respectfully submitted,

DION R. HOLM,
City Attorney.

RJB

To: Board of Supervisors,
Attn: John R. McGrath, Clerk.

cc: Office of the Mayor.

OPINION NO. 307

December 15, 1950

SUBJECT: SALE OR LEASE OF PROPERTY BY COMMUNITY REDEVELOPMENT AGENCY.

Dear Sir:

You have asked whether in my opinion the present §45.7 of the Community Redevelopment Act protects the public interest against sale or lease of property at less than a proper price.

This section, as amended by the 1950 session of the legislature, reads, in so far as applicable:

> "Sec. 45.7. No property, real or personal, improved or unimproved, or any interest therein, acquired or constructed in whole or in part with moneys from the redevelopment revolving fund shall be sold or leased at a price or encumbered (whether by mortgage, deed of trust or otherwise) for an amount less than its fair value for uses in accordance with the redevelopment plan. * * * * * If any property acquired in whole or in part from the redevelopment revolving fund is to be sold or leased by the redevelopment agency, the sale or lease must first be approved by the legislative body. Such approval by the legislative body shall be by resolution adopted after public hearing. Notice of the time and place of such hearing shall be published once in the official newspaper of the community at least one week prior to such time. Such resolution shall be adopted by a majority vote unless the legislative body shall have provided by ordinance for a two-thirds vote for such purpose."

Further, §29 of the same Act reads in part:

> "Sec. 29. Each redevelopment agency shall constitute a public body, corporate and politic, exercising public and essential governmental functions, and, subject to the limitations imposed by this act, shall have the following powers in addition to the others herein granted:
>
> * * * * * * *
>
> "(h) Within the redevelopment area or for purposes of redevelopment: * * * * * * * to sell, lease, exchange, subdivide, transfer, assign, pledge, encumber (by mortgage, deed of trust or otherwise), or otherwise dispose of any real or personal property or any interest therein; * * * * * * * Any such lease or sale may be made without public bidding but only after a public hearing by the agency upon the proposed lease or sale and the provisions thereof."

It will thus be seen that before there can be a sale or lease of any property acquired in whole or in part from the redevelopment revolving fund, such sale or lease must first be approved not only by a majority of the five members of the Agency, but also by a majority of the eleven members of the Board of Supervisors of the City and County of San Francisco. As the Agency and its staff and the Board of Supervisors are now constituted, this in itself should be adequate protection to the public. But the Act goes further.

Sub-section (h) of Section 29 provides that "Any such lease or sale may be made without public bidding but only after a public hearing by the agency upon the proposed lease or sale and the provisions thereof." (Emphasis added). And Section 45.7 requires that approval of such sale or lease by the Board of Supervisors "shall be by resolution adopted after public hearing" (emphasis added) and provides that notice of the hearing shall be published at least one week prior thereto.

Therefore, any member of the public who so desires has at least two public opportunities to present any higher bid, or make any proper public comment or protest: first before the Agency itself, and then again before the Board of Supervisors. Since the members of the Agency are appointed by the Mayor and subject to removal for cause, and the members of the Board of Supervisors are elected by and responsible to the people of the City and County of San Francisco, it is my opinion that the requirement of approval by both bodies after a public hearing by each is adequate protection to the public as judged by the best standards of government.

You are so advised.

Respectfully submitted,

DION R. HOLM,
City Attorney.

VB

To: Mr. James E. Lash,
Director, Redevelopment Agency.

Opinion No. 308
December 15, 1950

SUBJECT: CONTINUOUS SERVICE NOT NECESSARY TO ENTITLE CITY EMPLOYEE TO FIFTEEN DAYS' VACATION.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

> "A question has been propounded to me concerning the annual vacation period for City and County employees, which I am unable to answer and in connection with which I hereby solicit your advice.
>
> "Section 151.4 of the Charter, which will become effective on January 1, 1951 provides in part that 'after five years' service every person so employed shall be allowed as long as he continues in his employment, a vacation with pay of fifteen days, annually, calculated as hereinafter provided.' Since said section does not specify 'continuous service,' the question arises as to whether those employees who have been employed five years or more in the aggregate, but not continuously, are entitled to a vacation of two weeks or three weeks.
>
> "Would you kindly favor me with your advices at your early convenience."

O P I N I O N

The pertinent portion of Section 151.4 of the Charter reads as follows:

> "Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment, provided that, after five years' service every person so employed shall be allowed, as long as he continues in his employment, a vacation with pay of fifteen days, annually, calculated as hereinafter provided. . . ."

It appears from the reading of the quoted portion of Section 151.4 that no qualification was placed by the electorate in computing the five-year period of service which the employee must serve before being entitled to fifteen days' vacation. Therefore, as long as an employee has served for a period of five years in the aggregate he would automatically be entitled to fifteen days' vacation annually.

The Board of Supervisors, however, have the authority to pass legislation in furtherance of a charter provision. Thus, it will be noted that Section 375 to Section 380, inclusive, of Part I of the San Francisco Municipal Code was enacted by the Board of Supervisors in furtherance of that portion of Section 151 of the Charter dealing with vacations. Later Section 377 was amended by Bill No. 3628 dealing with vacation schedules and, in particular, with former employees of the Market Street Railway Company.

The Board of Supervisors therefore in its discretion may determine the period of time during which an employee must complete his five years' service. Naturally, in exercising its discretion, the Board of Supervisors should consider the intent of the electorate and should be liberal in its interpretation of the period of time during which an employee must serve the five years.

You are therefore advised, any employee who has served five years, or more, in the aggregate (even though not continuously) would be entitled to a three-week vacation until such time as the Board of Supervisors may pass legislation defining the period of time during which an employee must serve his five years to be entitled to the fifteen-day annual vacation.

Respectfully submitted,

DION R. HOLM,
City Attorney.

To: Board of Supervisors,
Attn: Supervisor John J. Sullivan.

cc: Office of the Mayor.

RJB

Opinion No. 309
December 26, 1950

SUBJECT: POWERS OF BOARD OF SUPERVISORS IN CHANGING OLD AGE GRANTS OF AID, U.P. BRONSDON, MRS. AMY COGLEY, OSWALD A. WILLING; DUTIES OF CITY AND COUNTY TO QUALIFY FOR STATE AND FEDERAL SUBVENTIONS UNDER FEDERAL SOCIAL SECURITY ACT - POWERS OF STATE DEPARTMENT OF SOCIAL WELFARE.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

"The Board of Supervisors has continued until its meeting to be held on Tuesday, December 26, 1950, three appeals which have been taken from actions of the Board in establishing the amount of Old Age Security grants.

"In connection therewith the Board respectfully requests your written opinion with respect to the following:

"(a) Relative to the appeal of Mr. U. P. Brondson (see explanatory letter attached addressed to the Board of Supervisors by the Director of Public Welfare, under date of December 5, 1950), is the claim of the applicant a legally valid one? Further, may the Board at this time legally increase the amount of Mr. Brondson's grant without danger of compromising the position of the City and County with regard to receipt of State and Federal subventions?

"(b) Relative to the appeal of Mrs. Amy Cogley (see copy of letter attached addressed to the Clerk of the Board of Supervisors, by the Director of Public Welfare, under date of December 5, 1950), may the Board increase the amount of her grant?

"(c) Relative to the appeal of Mr. Oswald Willing (see copy of letter attached addressed to the Clerk of the Board of Supervisors by the Director of Public Welfare, under date of December 5, 1950), may the Board increase the amount of his grant?

"(d) With respect to the general subject of appeals taken pursuant to the provisions of Section 2181.1 of the State Welfare and Institutions Code, the Board desires to be informed by you as to what its powers are in connection with such appeals and as to what extent the Board may act in changing grants which have been allowed upon recommendation of the Public Welfare Department, without jeopardizing any financial assistance which the City and County may receive for aid to the aged.

"The Board will appreciate receipt of your advices on or before the date of the meeting mentioned above."

O P I N I O N

I will answer the various questions you have presented to me in the same order as they appear in the foregoing letter of request.

(a) (1) It is my understanding that the appeal of Mr. Bronsdon is based upon his contention that he is entitled to a grant of aid from the Board of Supervisors of not less than $65.00 based upon his interpretation of Section 2025 of the Welfare and Institutions Code. The foregoing section reads as follows:

> "Increase or decrease of federal contributions: Change in amount of aid: Maximum and minimum: Legislative intent. If, when, and during such times as the United States Government increases or decreases its contributions in assistance of the aged in this State above or below the amount being paid on January 1, 1947, or above or below the amount payable as a result of any such increase or decrease, the amount of the grant of aid provided for in this article shall be increased or decreased by an amount equal to such increase or decrease by the United States Government, but in no event shall the total aid granted under this chapter be more than seventy-five dollars ($75.00) nor less than sixty-five dollars ($65.00) per month. It is the intent of the Legislature that any change in contributions by the United States Government, whether increase or decrease, shall result in a corresponding change in the amount of this grant within the limits established by this section."

The amount of aid to be extended under the California Old Age Security Law to an eligible applicant is a maximum grant of $75.00 as is set forth in Section 2020 of the Welfare and Institutions Code, which reads as follows:

> "Amount of aid allowed. The amount of aid to which any applicant shall be entitled shall be, when added to the income (including the value of currently used resources, but excepting casual income and inconsequential resources) of the applicant from all other sources, seventy-five dollars ($75) per month. If, however, in any case it is found the actual need of an applicant exceeds seventy-five dollars ($75) per month, such applicant shall be entitled to receive aid in an amount, not to exceed seventy-five dollars ($75) per month, which when added to his income

(including the value of currently used resources, but excepting casual income and inconsequential resources) from all other sources, shall equal his actual need."

The Attorney General of the State of California was called upon to construe the two foregoing Welfare and Institutions Code sections after an increase of Federal subvention granted to the State of California as a result of the "Social Security Act Amendments of 1946" and his opinion reads in part as follows:

"Section 2025 of the Welfare and Institutions Code provides that 'during such times as the United States Government increases its contributions in assistance of the aged in this State, the amount of the grant of aid provided for in this article (Art. 2, Chap. 1, Div. 3, Welfare and Institutions Code) shall be increased by an amount equal to such increase by the United States Government.'

"The only 'grant of aid' provided for in Art. 2, Chap. 1, Div. 3 of the Welfare and Institutions Code is found in Section 2020 quoted above. This 'grant of aid' is to eligible individuals and amounts to $50.00 (now $75.00) less income. The amount must now 'be increased by an amount equal' to the increase by the Federal Government.

"What has been said in this opinion relative to the increase of $5.00 to each recipient of old-age assistance does not necessarily apply to the case of aged persons whose need has been determined on a budget basis and who are in receipt of an income which has been added to the aid received by them meets their budgeted needs. Undoubtedly, in these cases a reappraisal of the needs of the individuals in the light of current price conditions will reveal the necessity for budget increases. It must be remembered that additional aid cannot be granted to individuals when such aid added to their income equals an amount in excess of their budgeted needs."

8 OPS. CAL. ATTY. GEN. 106

A reading of the two sections together makes it apparent that Section 2020 establishes the sum of $75.00 as the maximum grant of aid that any eligible applicant may receive. The legislative intent

as to the operation of and purpose of this section is unequivocally stated in the last sentence of Section 2025 and there is no basis for the contention of Mr. Bronsdon that this section provides for a minimum grant of aid of $65.00 per month.

(2) The second question presented by you is whether the Board of Supervisors may, upon the appeal of Mr. Bronsdon, properly increase the amount of aid granted to him without compromising the position of the City and County of San Francisco with regard to receipt of State and Federal subventions.

To properly answer this question it is necessary to discuss the Federal Social Security Act and the relation of the State of California to it when participating in its benefits. This subject has been succinctly reviewed as follows:

> "The Social Security Act provides for grants to states which submitted and had approved state plans for old-age assistance. The act requires that a state plan for old-age assistance must (1) provide that it should be in effect in all political subdivisions of the state, and if administered by them, be mandatory on them; (2) provide for the establishment or designation of a single state agency to administer the plan, or to provide for the establishment or designation of a single state agency to supervise the administration of the plan; (3) provide for the granting to any individual, whose claim for old-age assistance is denied, an opportunity for a fair hearing before such state agency; (4) provide such methods of administration (other than those relating to selection, tenure of office and compensation of personnel) as are found by the Social Security Board to be necessary for the effecient operation of the plan; (5) provide that the state agency will make reports required by the Social Security Board; and (6) provide that, if the state is reimbursed for payments made to recipients of old-age assistance, the United States will be correspondingly reimbursed.
>
> . . . . . .
>
> "The State of California acting through its Legislature and the State Department of Social Welfare and the State Social Welfare Board has made every effort to set up a state plan for aid to the needy aged in conformity with the provisions of the Social Security Act, and that

plan was early approved by the Social Security Board. The admitted policy of the State has been to comply with the administrative requirements of the Social Security Act. The State has set up a statewide plan which is in effect in all of the political subdivisions of the state and which is mandatory on them (W. & I. Code, Section 103.5); it has set up a single state agency to supervise the administration of the plan (W. & I. Code, Sec. 103.5); it has provided for fair hearing for dissatisfied applicants (W. & I. Code, Sec. 2182); it has complied with the Social Security Board requirements as to methods of administration (W. & I. Code, Sec. 119.5); it has made provision for compliance with the reporting requirements of the Social Security Board (W. & I. Code, Sec. 2140); and, it has provided for federal participation in reimbursement payments (W. & I. Code, Sec. 2024)."

5 OPS. CAL. ATTY. GEN. 138

From the foregoing it is apparent that only states which conform to the requirements of the Federal Social Security Act are eligible for grants for the old age assistance of eligible applicants.

Provision for public aid to the needy aged is made a matter of statewide concern by Section 103.5 of the Welfare and Institutions Code. The same section also designates the Board of Social Welfare as the single State agency with full power to supervise every phase of the administration of public assistance plans in order to secure full compliance with the provisions of Titles 1 and 4 of the Federal Social Security Act.

The State Department of Social Welfare is given the power to and shall prescribe the form of application, the reports which are necessary, the additional rules and regulations necessary to carry out the provisions of the State Old Age Security Law and not inconsistent therewith. Such rules and regulations shall be binding upon the boards of supervisors of the various counties.

SECTION 2140, W. & I. CODE.

It is further provided that the State Department of Social Welfare shall supervise and pass upon the measures taken by the county boards of supervisors for the care of needy aged citizens.

SECTION 2141, W. & I. CODE.

The duties of the counties in administering State funds are defined in Section 114 of the Welfare and Institutions Code and the effect of that section has been construed to be as follows:

> "If such mandatory procedures should be prescribed and ignored, the Department has adequate remedies to secure compliance with the law and the rules and regulations supplemental thereto. It is our opinion that the above cited sections, and particularly section 114(c), contain ample authority for the Department to withhold grants to counties as reimbursement for aid expended and for administrative expenses, or to withhold grants for administrative expenses only, where the minimum standards presribed by the Department are not met by the county or its officers or employees, and where the purpose is to secure uniform administration so as to assure the continuation of Federal grants in aid to this state. (Citations omitted)
>
> 12 OPS. CAL. ATTY. GEN. 83, 92

(1) You are, therefore, advised that the claim of Mr. Bronsdon is not supported by the Welfare and Institutions Code.

(2) You are further advised that the Board of Supervisors may not legally increase the amount of Mr. Bronsdon's aid by reason of the provisions of the several sections of the Welfare and Institutions Code heretofore discussed unless said increase granted meets all code requirements.

(b) The appeal of Mrs. Amy Cogley involves the matter of continuing special needs and the sums to be allocated therefor as such needs arise.

This matter is not specifically set forth in the Welfare and Institutions Code but is administered by the State Department of Social Welfare pursuant to the rule and regulatory making powers authorized by Section 2140 of the Welfare and Institutions Code. The Department pursuant to this power has compiled a Manual of Policy and Procedures which provides for rules to be considered when carrying out the provisions of the Welfare and Institutions Code.

I am informed that this Manual has been used as the basis for ascertaining and computing the needs of Mrs. Cogley, Mr. Bronsdon and Mr. Willing.

I note that Mr. Born has, as appears in his letter, dated December 7, 1950, addressed to Mr. John R. McGrath, Clerk of the Board of Supervisors, reported his findings upon reviewing the application

of Mrs. Cogley. He has found that in his opinion full consideration has been given to Mrs. Cogley's needs and that she is receiving all the aid to which she is entitled under the rules and regulations of the State Department of Social Welfare.

On February 16, 1949, the State Department of Social Welfare issued its Department Bulletin No. 359 (Old Age Security, Security Blind) addressed to county boards of supervisors, county welfare departments and county auditors on the subject of Old Age Security - Determination of Security Payments. This bulletin rescinded in its entirety certain sections of the Manual of Policies and Procedures in point for our purposes relating to the determination by budget of total need; the definition and determination of special needs in Old Age Security; the definition and determination of needs in excess of continuing needs.

I have reviewed the various items considered in computing Mrs. Cogley's grant for June, 1950, as appears in Mr. Born's letter of December 7, 1950, and will cite the applicable provisions of the said Bulletin 359, the Manual, or the Welfare and Institutions Code.

The basic need of an Old Age Security recipient is considered to be $75.00.

SECTION 2020, W. & I. CODE,
BULLETIN 359-A

The bulletin defines basic continuing needs as those common to all recipients which are to be met on $75.00 a month in Old Age Security. These amounts constitute the "yardstick" to be used to determine the amount of special need which may exist for certain individual items; also to measure the value of any basic needs which are provided the individual without cost to him.

BULLETIN 359-B

Special needs are those not common to all recipients, but an individual may have need for one or more of them. These needs may be taken into consideration under the circumstances and within the monetary limits indicated under special subjects.

BULLETIN 359-C

Section C 1 of the Bulletin provides that when the recipient eats his meals in restaurants, the cost in excess of basic food shall be $21.40 a month, which conforms to the computation for Mrs. Cogley.

Section C 2 of the Bulletin provides that a special need

exists when the rent including utilities paid by the recipient exceeds $21.30 ($15.00 rent and $6.30 utilities). Assuming that the $37.50 listed for rent represents the payment made by Mrs. Cogley for rent including utilities, the computation conforms with the said Bulletin.

Section C 7(a) of the Bulletin defines as a special need the need required for care or treatment by a physician or surgeon in the amount actually required to purchase such service. The $3.00 listed for one visit to the doctor by Mrs. Cogley is justified by the Bulletin.

Section C 7(c) of the Bulletin under the heading of Medication authorizes as a special need prescriptions and drugs delivered to a recipient in the amount of the vendor's actual charge. If such medicines were delivered to Mrs. Cogley they are an authorized special need.

Section C 7(e) (1) of the Bulletin under the general heading of Occasional Unusual Needs has listed dentures and dental work as a special need. The arrangement whereby $10.00 payments therefore are extended over a payment of fifteen months is not objectionable and the computation of this item of Mrs. Cogley's grant conforms with the Bulletin.

The matter of total need which is a mathematical computation need not be discussed further.

Section 2020 of the Welfare and Institutions Code provides that income of the recipient must be considered in arriving at the amount of aid allowed. Section 151-60-2 of the Manual provides that pensions constitute income in the month received where recipient is a dependent of a serviceman. The deduction made from the total need in the sum of $60.00 in the computation of Mrs. Cogley's case is authorized by the Manual.

The eligibility of Mrs. Cogley to the payment of $69.00 in the subject month is authorized by Section 2020 of the Welfare and Institutions Code.

You are therefore advised that, assuming the facts to be as presented to me by Mr. Born's letter relating to this subject and considering the Welfare and Institutions Code, Manual and Bulletin of the State Department of Social Welfare applicable thereto, that the Board may not legally increase the amount of the grant to Mrs. Cogley.

(c) The matter of the appeal of Mr. Willing presents the same general considerations as are presented by the appeal of Mrs. Cogley.

A similar letter from Mr. Born, dated December 5, 1950, addressed to Mr. John R. McGrath, Clerk of the Board of Supervisors reported his findings upon reviewing the application of Mr. Willing.

In reviewing Mr. Willing's grant and the items constituting it, I will only refer to those items which are new or different and have not been previously considered in the discussion under Mrs. Cogley's application.

Considering the month of October, 1950, the first new item is laundry in the sum of $3.00. Bulletin No. 359, Section C 9 provides that the actual cost of laundry service, not to exceed the maximum of $5.00 a month, represents a special need when the recipient does not have facilities for doing the laundry himself or when his health or handicap prevents such activity. The said Bulletin authorizes the foregoing laundry allowance to Mr. Willing, and also for the months of November, 1950, December, 1950, and January, 1951, because all amounts are below the $5.00 maximum.

Section C 7(e) (3) of the Bulletin defines as a special need of an occasional or unusual nature, eyeglasses. The allowance of $10.00 for the payment of eyeglasses for October, 1950, is authorized by the foregoing.

The remainder of the October, 1950, computation is in conformity with the applicable law. The computation of the other three months covered by Mr. Born's letter relative to Mr. Willing's grant of Old Age Security present no new legal considerations and are considered to be in order.

You are therefore advised that, assuming the facts to be as presented to me by Mr. Born's letter relating to Mr. Willing, and considering the Welfare and Institutions Code, and the Bulletin of the State Department of Social Welfare applicable thereto, that the Board may not legally increase the amount of the grant to Mr. Willing.

(d) The applicant is given the right of appeal from the decision of the Board of Supervisors. I have been unable to discover any power that the Board of Supervisors has after the applicant has appealed to the State Department of Social Welfare. This viewpoint is supported by the provisions of Section 2181.1, supra, which provides that an applicant who does not apply for hearing before the Board of Supervisors may appeal directly to the State Social Welfare Board as provided in Section 2182.

The power of the Board of Supervisors to act in changing grants which have been allowed upon recommendation of the local Department of Public Welfare without jeopardizing any financial assistance which the City and County may receive for aid to the aged has been previously discussed herein.

From the discussion relative to Mr. Bronsdon's appeal, it is apparent that certain standards have been established by the Legislature and the State Department of Social Welfare which the counties must observe. A failure to observe such standards must result in the termination of aid from the state.

Section 2023 of the Welfare and Institutions Code reads as follows:

> "State funds denied counties failing to comply with requirements. No county shall receive any apportionment of funds from the State under the provisions of this chapter unless it is complying with all of the requirements of this chapter."

From the foregoing it is apparent that State funds will be denied counties which do not comply with the requirements of the State Old Age Security Law.

This viewpoint is further strengthened upon reviewing a recent opinion of the Attorney General of this State wherein the following language appears:

> "Hence, one of the dominant and basic purposes of this State's public assistance laws, is to preserve conformity with the Federal Social Security Act (Opinions NS 4191 (3-27-42), 48/265 (12-2-48), 12 Ops. Cal. Atty. Gen. 285; Const. Art. XXV, sec. 2; W. & I. CODE, secs. 104.6, 2023, 2024)"

14 OPS. CAL. ATTY. GEN. 263

To summarize, the Board of Supervisors may act in changing grants only as they are authorized by the Legislature and by the reasonable rules of the State Department of Social Welfare.

You are advised in accordance with the foregoing.

Respectfully submitted,

LTK

DION R. HOLM
City Attorney

To: Clerk, Board of Supervisors

OPINION NO. 310

December 26, 1950.

SUBJECT: FEDERAL SOCIAL SECURITY AMENDMENTS - EMPLOYEES OF CITY AND COUNTY OF SAN FRANCISCO - MUNICIPAL RAILWAY EMPLOYEES

Dear Sir:

I am in receipt of your request for an opinion, reading as follows:

REQUEST

"Through the Municipal Finance Officers' Association of the United States and Canada, we are informed of new provisions of the Social Security Act identified as HR 6000 - Security Amendments of 1950 under which state and local government employees become or may become subject to the Federal Social Security Program at January 1, 1951.

"In connection with the Social Security Act as now amended under HR 6000, will you please furnish me with your Opinion and advice as to:

"(1) The effect on the City and County of San Francisco and its employees, engaged in either governmental or proprietary functions.

"(2) Requirements for any legislation by the Board of Supervisors."

The legislation to which you refer is comprehended by the Social Security Amendments of 1950, constituting numerous changes in the Federal Social Security Act.

The Act, in its original form, appears as Chapter 7, Title 42, of the U. S. Code. The Social Security Act Amendments of 1950, sometimes hereinafter referred to as "the 1950 Amendments," were adopted in the 81st Congress in the 1950 session through H. R. Bill 6000. Except for a certain retroactive feature hereinafter set

forth (Infra, this page), the 1950 Amendments become effective, under the terms of the law, on January 1, 1951. The taxes hereinafter mentioned are imposed for the general purposes of "Social Security," including old age pensions, unemployment insurance, and other forms of social insurance. (42 USC 902).

The constitutionality of the Federal Social Security Act, as it originally stood, was sustained in

Helvering v. Davis (1937),
301 U. S. 619, 81 L. Ed. 1307,
109 A. L. R. 1319.

Provisions of the Federal Law as Amended

Section 1400 of the Internal Revenue Code (USC Title 26) and Section 1001 of the Social Security Act (USC Title 42), as enlarged by the 1950 Amendments, impose a tax upon the income of every individual connected with the operation of the Municipal Railway commencing with the calendar years of 1950-1953, both inclusive, of 1-1/2 per cent on wages received. Remuneration in excess of $3,000 is not subject to tax to the extent of such excess. (Section 1011 USC Title 26). Such tax is without deduction in the computation of other income tax upon the individual. (Section 1003 USC Title 26). Commencing with the calendar year 1954 and in increasing gradients in subsequent periods, such tax is in higher amounts. (Section 201 of Amendments of 1950).

In direct terms and styled as an "excise tax", a tax is levied upon the employer (the City and County of San Francisco), commencing with January 1, 1951, in corresponding percentages. (Section 1004 of Internal Revenue Code (USC Title 26), as amended by Section 201 of the 1950 Amendments).

We have heretofore mentioned a certain retroactive feature. That is found in an interpretation to the effect that the tax upon the employer attaches when wages are either "actually or constructively paid." (Reg. 106, Commerce Clearing House - Federal Insurance Contributions Act - (Sec. 5755)). Under that Regulation, constructive payment arises only when money is made available in such manner as to permit the employee to draw thereon. We are informed that, by reason of the payment to Municipal Railway employees of an hourly wage in the application of Section 151.3 of the Charter, it is impossible to make payment until several days after the working period.

In all likelihood, therefore, a tax will be imposed upon a basis of actual payment for a working period preceding January 1, 1951. The tax levied upon the employee is to be collected and paid over by the employer to the Collector of Internal Revenue of the local jurisdiction. (Internal Revenue Code, Section 1002, USC Title 26).

Provision is made for the imposition of penalties, the payment of interest on delinquent amounts and the filing of claims for refund, in the event that it is asserted that overpayments have been made. (Sections 1006 and 1007). In the payment of either tax, a fractional part of a cent shall be disregarded, unless it amounts to one-half cent, or more, in which event it shall be increased to one cent. (42 USC 1105, subd. (f)).

Under the terms of Section 1105 (USC Title 42), both taxes (the tax levied upon the employee and the tax levied upon the employer) are to be collected by the Bureau of Internal Revenue at such times, and under such conditions, as provided for by rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, not inconsistent with Sections 1001-1011 of Title 42, USC (Section 1007 of 42 USC). Return is to be made by the employer on Form 941, covering both taxes. The due date on both return and payment of tax is on the last day of the month following the quarterly period. That is to say, the first due date on the return and payment of tax (speaking conjunctively of both taxes) is April 30, following the first quarterly period of January through March, and like dates thereafter. (Employer's Tax Handbook, issued by Bureau of Internal Revenue, Circular E, Rev. Jan. 1951, page 13, Sec. 14).

Section 104 of the 1950 Amendments adopts a new section 209 of Title II of the Social Security Act (42 USC 409). However, in that part of the new legislation, there is repetition from the original statute (see subdivision 7 of Section 409 of 42 USC) of the exemption from the Social Security Act of employees of the State and itspolitical subdivisions. The language of exemption in the 1950 Amendments is as follows:

> "(8) Service (other than service included under an agreement under section 218 and other than service which under subdivision (1), constitutes covered transportation service) performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more

of the foregoing which is wholly owned by one or more States or political subdivisions." (Emphasis added)

The language just quoted demonstrates that municipal employees, in general, and not inclusive of those engaged in "covered transportation service," are still without the realm of Federal Social Security. The clause (above) referring to an agreement is of no pertinency, so far as the City and County of San Francisco is concerned, for the reason that Section 106 of the 1950 Amendments (amendatory of Section 218 of the Act) does not permit an agreement between the Administrator (of Social Security) and a State for the coverage in Social Security of employees of a State or political subdivision thereof, where the employees are members of a Retirement System.

However, the exception from the exception--in other words, the inclusion in Social Security of those engaged in "covered transportation service"--is of controlling force, as we shall observe from present reference to section (1) of subdivision (b) of Section 104 of the 1950 Amendments.

That portion of the 1950 Amendments reads as follows:

"Covered Transportation Service

"(1) (1) Except as provided in paragraph (2), all service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system shall constitute covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and prior to 1951.

"(2) Service performed in the employ of a State or political subdivision in connection with the operation of its public transportation system shall not constitute covered transportation service if--

"(A) any part of the transportation system was acquired from private ownership after 1936 and prior to 1951, and substantially all service in connection with the operation of the transportation system is, on December 31, 1950, covered under a general retirement system providing benefits which, by reason of a provision of the State constitution dealing specifically with retirement systems of the State or political subdivisions thereof, cannot be diminished or impaired; . . ." (Emphasis added)

O P I N I O N

Taxes for Social Security are, Under the 1950 Amendments, Imposed upon the Wages of Persons Employed in Connection with the Operation of the Municipal Railway.

The period of acquisition of part of the transportation system, specified in (1) immediately above, fits the instance of the Municipal Railway of the City and County of San Francisco.

As to exemption based upon the presence of a retirement system, that exemption comes into play only where there is a provision of the State Constitution "dealing specifically" with retirement systems and to the effect that the retirement system of the State or political subdivision cannot be "diminished or impaired." There is no such provision in the Constitution of the State of California.

No doubt, there would be merit in a contention that any attempt to diminish or impair the retirement system of the City and County of San Francisco, by means of legislation, would be unconstitutional, so far as vested rights are concerned. (See the cases cited, Infra, p. 19). However, such result in law does not fit the pattern required by the Amendments of 1950. According to that legislation, in order to establish an exemption, there must be a section of the State Constitution "dealing specifically" with the subject of attempted impairment or diminishment of the retirement system.

There is such provision in the Constitution of the State of New York.

Article V, Section 7 of the Constitution of the State of New York reads as follows:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The result is that employees upon a transportation system owned by the City of New York are outside Federal Social Security. The further result ensues that through acquisition, in part, between the dates mentioned, Boston, Cleveland, Seattle and San Francisco are within Social Security with respect to employees upon the transit systems owned by them.

Elements of discrimination developing from the provisions of Section (1) above quoted, and possibly resulting in illegality, will be discussed hereinafter. (Infra, p. 18).

We are, therefore, constrained to rule, in substance, as follows:

Under the language of the Amendments of 1950, upon the face (and reserving for the time being any discussion as to validity of taxes which the statute, in present form, seeks to impose), it is our conclusion that municipal employees, exclusive of employees of the Municipal Railway, are not within Federal Social Security--that employees who render service in the transportation system of the Municipal Railway of the City and County of San Francisco fall within the above terms of the Federal Social Security Act--that such persons are, during the calendar year 1951, subjected to a tax of 1-1/2 per cent on wages up to $3,000 per annum for Federal Social Security, with such tax to be collected and accounted for and paid by the City, as employer --that the City (if the law is valid as to it) must pay the same percentage to the federal government on individual wages up to $3,000 in Municipal Railway service by way of "excise tax."

There Appears to be No Legal Objection to the Tax so far as the Employees are Concerned.

Since the City is constituted as the agency for the collection of the tax imposed upon this particular class of employees, it is fitting that we preliminarily discuss possible questions of validity in so far as Municipal Railway employees themselves are concerned. As we have seen, this contribution by the employees is levied as an "income tax".

Cases will follow which deal with the problem as a whole but which, as a portion of the decision in each instance, determine that an income tax may be levied, on general principles of law, upon employees engaged in the proprietary functions of a municipality. Inasmuch as these cases are also pertinent on the subject of the validity of the City's tax liability, further discussion of these decisions will be deferred until we reach the subject of the validity of the tax sought to be imposed upon the City as employer. (Infra, p. 8).

Some degree of uncertainty is occasioned by the presence in the reports of the case of

Frey v. Woodworth (D.C. Mich. 1924), 2 Fed. (2d) 725,

which held that the income of employees of the transportation system of the City of Detroit was not subject to tax by the federal government. The case held, in accord with decisions to follow, that immunity from federal taxation upon a municipality extends only to the governmental functions of the latter, in distinction from proprietary functions. However, the ground of the decision was that the City of Detroit was engaged in a governmental function in operation of a street car system, because utilization of the highways was itself a governmental function. This questionable basis of the decision need not be subjected to further scrutiny. We find, on examination of the records of the Supreme Court of the United States, that the Attorney General (representing the Commissioner of Internal Revenue) obtained an order for dismissal of appeal (70 L. Ed. 791), so that the case, in any event, is no more than a decision of a District Court of the United States.

We further find that the case, although not expressly, is impliedly overruled by subsequent decisions of the United States Supreme Court presently to be mentioned, holding that income earned as an employee of a proprietary function of a municipality (including a street railway) may be constitutionally subjected to federal tax. (Infra, pp. 11 and 13).

By federal statute known as the Public Salary Tax Act of 1939, Congress has recognized the holding of the United States Supreme Court in

Graves v. State of New York (1939),
306 U. S. 466, 83 L. Ed. 927,
120 A. L. R. 1466 (Infra, p. 12).

and has exempted from federal tax only that income of State and Municipal employees accruing prior to 1938. (26 USCA, p. 236, note 209).

We, therefore, are of the view that no serious legal question arises with respect to the tax upon employees of the Municipal Railway for Federal Social Security.

The Tax Upon the Employee and the Tax Upon the Employer are to be Separately Considered.

As we have pointed out, the two taxes--the income tax upon the employee and the excise tax upon the employer--are separate and distinct. It might be true that the former is entirely valid, while the latter might, at the same time, and upon proper legal ground, be considered invalid. In this connection, we call attention to the separability clause of the Federal Social Security Act (42 USC 1303), to the effect that the invalidity of one section shall not affect any other. Furthermore, and apart from that clause, it appears that since the two taxes are separately imposed upon different theories, a result of validity or invalidity with respect to one would not affect the other. We are sustained in this conclusion by the decision of the United States Supreme Court in

Carmichael v. Southern Coal and Coke Company (1937)
301 U. S. 495, 512,
81 L. Ed. 1245, 1254,
109 A. L. R. 1327,

where the Court held that an employer could not assail the tax, insofar as the employee is concerned, because the two taxes, although imposed by the same statute, are separate and distinct.

This makes it necessary for us to consider, in independent discussion, the tax which wholly affects the City.

Inasmuch as the City, in the Operation of the Municipal Railway, is Engaged in a Proprietary Function, there is no Constitutional Objection to Federal Taxation upon Funds Disbursed by the City in such Activity, if the Tax is Otherwise Valid

We have heretofore called attention to the theory of contribution by the employer where the employee (as here) is embraced within the terms of the Federal Social Security Act. The contribution by the employer to Federal Social Security is imposed as an "excise tax," measured by the amount of each individual wage up to $3,000 per annum. The designation in the statute of a tax as an "excise tax" is, of course, entitled to weight, but is not conclusive.

Douglas Aircraft Co. v. Johnson (1939),
13 Cal. (2d) 545, 550 (4).

However, the courts have several times directly held that the tax imposed upon the employer under the Federal Social Security Act is, in reality, an excise tax--that is, a tax upon the right to employ and not upon the fund itself.

United States v. Glenn L. Martin Co. (1939),
308 U. S. 62, 84 L. Ed. 82,
124 A. L. R. 1017;

Steward Machine Co. v. Davis (1937),
301 U. S. 548, 81 L. Ed. 1279,
109 A. L. R. 1293;

15A Words and Phrases 173.

The importance of the excise characteristic in the tax upon the employer is that it may be levied by Congress uniformly throughout the United States under Section 8 of Article 1 of the Federal Constitution and need not be apportioned as to States and their population as required in the instance of a direct tax under Article I, Section 9 of the Federal Constitution.

Aside from the above basis of constitutionality, we are not here further concerned with the excise feature in the tax. Various cases hereinafter appearing concern both excise and direct taxes. The legal principles applied deal with both natures of tax.

Granting that the tax upon the employer falls under the category of an excise tax, we turn to constitutional problems flowing from the conception of dual sovereignty--that sovereignty existing in a State (of general powers) and inclusive of political subdivisions, and that sovereignty existing in the federal government (of delegated powers).

It is true that there is not in so many words any constitutional inhibition, in the State Constitutions (so far as we know) or the Federal Constitution, against taxation by one sovereignty upon the other. However, in the early and leading case of

McCulloch v. Maryland (1819)
4 Wheat. 316, 4 L. Ed. 579,

the Supreme Court of the United States held, through Chief Justice Marshall, that a State cannot tax the property of a National Bank created and owned by the United States. Justice Marshall there expressed words which have since become famous--that "the power to tax is the power to destroy"--which formed the ground of his opinion.

Chief Justice Marshall there pointed to a distinction between taxation imposed by the federal government upon a State and taxation imposed by a State upon the federal government. He indicated that, in the former instance, the people of the State, through their federal representatives, have levied a tax upon their own properties, facilities or institutions, and, in such instance, are to be considered subject to a measure of political restraint; he further indicated that where a State imposes a tax upon a federal instrumentality, the people outside the State have no representatives participating in legislation in imposition of the tax and hence are not subjected to such political restraint. (4 L. Ed. 608-609).

However, the distinction thus drawn by Chief Justice Marshall appears to have been lost sight of in subsequent decisions. His decision was, afterwards, judicially interpreted to mean that neither sovereignty could impose a tax upon the other (and in referring to taxation by the federal government upon a State, we are, of course, speaking also of taxation upon a municipality, a political subdivision of a State).

For example, in

Buffington v. Day (1870),
11 Wall. 113, 20 L. Ed. 122,

involving an early income tax law of the federal government, it was held that the federal government could not levy an income tax upon the salary of a probate judge, a judicial officer of the State.

Thereafter, it became the expression of the rule that neither sovereignty could tax the other, whether it be by way of "direct tax" or "excise tax." However, even in these earlier days when states or municipalities were not active in the exercise of proprietary functions, the courts were careful to limit the statement of the rule to the implied exemption of the State in governmental functions.

Annotation in 76 L. Ed. 828 (column 1);

Annotation in 120 A. L. R. 1477, 1481
(middle of column 1).

Afterwards, there appeared in the reports decisions concerning operation by states of the liquor distribution business.

South Carolina v. United States (1905),
199 U. S. 437, 50 L. Ed. 261,
4 Ann. Cas. 377;

Ohio v. Helvering (1933),
292 U. S. 360, 78 L. Ed. 1307.

In those cases, it was held that a State, engaged in such character of business, was subject to payment of excise taxes levied, in general, upon the operation of such business. The Court held that, while the exercise of such powers by a State was entirely valid, nevertheless, in such activity, the State was engaged in a proprietary field rather than in a governmental one, and therefore can properly be subjected to a tax burden equivalent to that borne by all persons, in general, engaged in that business. Doubtless, the same reasoning applies to the operation of a street railway by a political subdivision of a State. This, we shall presently observe, the Supreme Court of the United States later specifically held.

Then followed the decision of the United States Supreme Court in

Helvering v. Gerhardt (1938),
304 U. S. 405, 82 L. Ed. 1427.

In that case, employees of the Port of New York Authority, a construction engineer and two assistant general managers, regularly in the employ of that agency, sought immunity from federal income tax upon the ground that the imposition of such tax placed an unconstitutional burden upon the States of New York and New Jersey. The Authority was a bi-state corporation, organized under statutes of both New York and New Jersey and by Act of Congress. It operated terminal facilities within the Port of New York comprising territory both in New York and New Jersey. In addition to the construction and maintenance of such terminal facilities and bridges, it operated an interstate bus line over one of the bridges. It had no stockholders and none of its profits inured to the benefit of private persons. In holding that the tax was constitutional, the Court said (p. 1437 of 82 L. Ed., top of column 2):

> "A non-discriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken,

> or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see Indian Motorcycle Co. v. United States, supra (283 U. S. p. 581, 75 L. Ed. 1284, 51 S. Ct. 601, footnote 1)) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the stato a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far."

While it is true that the above discussion dealt with a federal income tax upon individuals, it must nevertheless be recognized that the reasoning fairly extends to an excise tax which might be levied by the federal government upon the utility itself.

The case which follows enunciates an extremoly broad ruling which also no doubt is applicable here.

Graves v. State of New York (1939),
306 U. S. 466, 83 L. Ed. 927,
120 A. L. R. 1466 (Supra, p. 7)

In this case, the validity of a statute of the State of New York was involved in so far as it sought to impose an income tax upon an employee of the federal agency, Home Owners' Loan Corporation. The Court held that such tax was lawful even though the operation of the Home Owners' Loan Corporation might be considered as in the exercise of a governmental function. Although this case concered a state tax upon the wages of a federal employee, the Court went to the length of holding that either entity (federal or state) may constitutionally tax the salaries or wages paid by

the other, provided that such tax is not discriminatory in nature--that is, that it does not single out the public employee.

Referring to

Buffington v. Day (Supra, p. 10).

and another decision, the Court stated (120 A. L. R. 1473, bottom of column 2) that these cases

> ". . .are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."

We are of the view that like reasoning applies also to excise taxation as against the employer.

As we have seen, the ruling of the Graves case was implemented by Congressional legislation known as the Public Salary Tax Act of 1939. (Supra, p 7).

The decision of the Graves case, even though extended by way of dictum, seems conclusive as to federal taxation upon the wages of all classes of state and municipal employees. For, if it be true that the wages of governmental employees may be subjected to federal income tax, it follows a fortiori that compensation of those in proprietary functions of a state or municipality may likewise be subjected to income tax. It likewise would seem to follow that an excise tax upon such compensation (as provided for by the 1950 Amendments) would likewise be valid and constitutional, provided other requirements of validity and constitutionality are met. (Infra, p 18)

Returning to the field of proprietary functions (with which we are here particularly concerned), we find the case of

Helvering v. Powers (1934)
293 U. S. 214, 79 L. Ed. 291,

to be of the utmost importance. This case preceded the decision in the Graves case. However, it may fairly be said to supplement the Graves case in that its line of reasoning demonstrates (at least so far as proprietary functions are concerned) that

the excise tax upon the employer under social security is to be placed upon the same basis of legality as the income tax upon the employee.

In the Helvering v. Powers case, the Trustees of the Boston Elevated Railway Company claimed immunity from the federal income tax upon the ground that they were public officers of the Commonwealth of Massachusetts.

A statute of Massachusetts provided for the operation of the Boston Elevated Railway Company (theretofore a private corporation) by a Board of Trustees appointed by the Governor. They were to fix fares and manage the railway company. Although the Act provided that they (the Trustees) were to be considered agents of the company and not of the State (p. 293 of 79 L. Ed., bottom of column 1), the Supreme Court treated them, for the purposes of the decision, as "public officers" (p. 294 of 79 L. Ed., top of column 1).

In holding that the Trustees were subject to federal income tax, the Court stated (p. 295 of 79 L. Ed., top of column 2):

> "And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity." (Citing authorities)

In referring to the liquor cases, heretofore mentioned, the Court further stated (p. 296 of 79 L. Ed., top of column 2):

> "We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. If, in the instant case, the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct

operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the State has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity."

We consider this language strongly persuasive in the survey of the question of validity of the excise tax upon the employer under social security. Postponing for the moment any discussion of alleged discrimination, we find it to be true that certain employers (including San Francisco) are placed, through an excise tax, upon the same basis as all private employers in transportation systems in general. According to the reasoning of the Court, exemption from taxation cannot be created through this proprietary operation of the City.

In accord with, and later than, the case which has just been presented, is

State of New York v. United States of America (1946), 326 U. S. 572, 90 L. Ed. 326.

The question in that case was whether a federal excise tax on the business of distributing mineral waters could constitutionally be applied to mineral water produced and sold by the State of New York from Saratoga Springs, New York.

Mr. Justice Frankfurter delivered an opinion which is first in the report. In upholding the validity of the tax, he had this to say (p. 333 of 90 L. Ed., bottom of column 2):

"There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a

State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. (Citing cases) If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy.'"

The foregoing opinion was concurred in by but one other Justice. Inasmuch as the opinion of Mr. Justice Stone was concurred in by three other Justices, it is to be regarded as the main opinion of the Court. We find, however, that both opinions, in general, adhere to the same line of reasoning. The opinion of Mr. Justice Stone states (p. 337 of 90 L. Ed., bottom of column 1):

"It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power." (Citing authorities)

The Saratoga Springs case is the last word of the United States Supreme Court upon this general subject. The Saratoga Springs case is, of course, to be read along with the Graves case (Supra)--the decision which held that there is no general exemption, simply because an individual happens to be an official, or in the employ, of a State or its political subdivision. The Graves case imposes as a test the inquiry as to whether local processes of government are being interfered with. The Saratoga Springs case indicates that, in any event, where a proprietary function is being engaged in, liability to federal taxation necessarily ensues.

Judged by the test hereinabove quoted from the Saratoga Springs case, and reiterated from the authorities which have preceded, we cannot escape the conclusion that the City and County of San Francisco is, in the operation of its municipal railway, subject to this excise tax inasmuch as this tax is upon a proprietary activity, does not interfere with any governmental function and is imposed generally among those engaged in the same line of business.

There is, of course, the one qualification, suggested in the Saratoga Springs case, in the language quoted above, that such tax must not be discriminatory. In that decision, the requirement was stated in this sense--that the tax there sustained was directed toward distribution, in general, of mineral water, and that the local sovereignty was not singled out as a taxpayer. The presence of the qualification--that there must be no discrimination as between the taxpayer sovereignty and other persons who are within the same taxation field--immediately suggests this correlative question: Does the exemption of the City of New York by the Amendments of 1950 establish discrimination in such measure as to create illegality with respect to those municipalities who are included in the tax?

There are Possible Features of Unlawful Discrimination Which Could Be Urged in the Event of Litigation.

It is a general rule of law--particularly applied to excise taxes, according to the precise words of Section 8 of Article I of the Constitution of the United States--that an excise tax must be uniform, and hence cannot discriminate among people or sovereignties who are engaged in the same line of business.

30 Am. Jur. 121, sec. 26.

Two possible factors of unlawful discrimination here appear, bringing about unconstitutionality under the due process clause of the Fifth Amendment to the Constitution of the United States.

(1) Restriction of Social Security to the transportation systems acquired in whole or in part between the dates specified.

This evidences a desire of Congress to include some systems and exclude others, without reasonable basis.

(2) Restriction of Social Security to the transportation systems of those municipalities located in a State not in possession of a constitutional provision specifically providing that a municipal retirement system cannot be diminished or impaired.

We have already observed that by skilled draftsmanship New York has been excluded because the Constitution of New York contains such specific provision.

It might be urged that the object of Congress appears to have been to exclude New York rather than to enact a basic requirement for exclusion. However, this conclusion is not necessarily called for in law.

Under general rules of law, a right to a pension does not become vested until the happening of the contingency on which the pension becomes payable; it follows that, up to that time, such contract rights as an employee possesses are subject to reasonable adjustment and modification, even though the contributions of the employee have been compulsory.

Kern v. City of Long Beach (1947), 29 Cal. (2d) 848;

McQuillin on Municipal Corporations (3rd Ed.) Vol. 3, Sec. 12.144, p. 512, note 21;

Annotation in 112 A. L. R. 1009.

It might be argued with some force that it was within the discretion of Congress to require greater security in a pension plan than afforded by the presence of the above general rule of law--hence the reference to a specific constitutional provision protecting against impairment or diminishment. However, the question is, in our judgment, of sufficient substance as to require a court decision, rather than preliminary speculation as to a court ruling.

Furthermore, so far as we are presently informed, there is no sound basis for bringing into Federal Social Security only those systems which have in part been acquired between certain dates. From the face of the law, it appears that a pattern has been devised under which certain municipalities automatically fall.

(3) A third ground for assertion of unwarranted discrimination is in the singling out of but one form of proprietary function--while other utilities of various municipalities are left alone.

The field of inquiry--as to possible discrimination--is so far within the realm of debate that we are not prepared, in the absence of any decision precisely on the subject, to prognosticate a ruling which the courts ultimately would enunciate. Inasmuch as the 1950 Amendments have not yet gone into effect, there is, of course, no such decision.

However, the legal conclusion as to unlawful discrimination is involved in doubt to such extent as possibly to justify an instruction to me as City Attorney by the Board of Supervisors, to institute litigation in order to obtain a definite court ruling. In such event, we would recommend payment of the tax, under protest, and the filing of a claim for refund, to precede the filing of such suit. In the present state of the law, the outcome of such litigation cannot be prophesied.

In conclusion, it is to be recognized that the courts, in general, have been reluctant to upset a tax structure upon the ground of discrimination. The courts have gone to extreme length

in permitting differentiations among taxpayers. This is illustrated by a decision of the United States Supreme Court concerning the Federal Social Security Act. We refer to

> Carmichael v. Southern Coal and Coke Company (1937), 301 U. S. 495, 512, 81 L. Ed. 1245, 1254, 109 A. L. R. 1327 (Supra, p. 8).

In that case, it was urged that the Federal Social Security Act was unconstitutional under the due process clause of the Fifth Amendment in that it unlawfully exempted certain classes of employees, as follows: Agricultural laborers, domestic servants, seamen, insurance agents, close relatives, employees of charitable institutions, interstate railways, and, in general, employees of federal or state governments or of political subdivisions.

It is true that some of these employees have, through the 1950 Amendments, been brought into Federal Social Security. However, the disposition by the Supreme Court of the United States, in this case, of the claim of discrimination is of present interest. The Court announced these general principles: (1) One business may be taxed and another untaxed, in order to aid the latter. (In the instant matter, selection has been made among those in the same business). (2) Exemption may be made for the encouragement of agriculture. (3) Inconvenience of collection may be considered a factor; employers of domestic help, farmers and family businesses ordinarily do not keep records with exactitude. (4) Policy and fear of constitutional restrictions may properly cause exemption of public employees.

The above treatment does not cover all of the classes of exemption established in the original legislation. The opinion in the cited case refrained from mention of all the classes.

None of the reasons advanced is pertinent in the consideration of the exemption in favor of New York, or of the exemption in favor of those who did not acquire transportation properties within the given dates, or of the exemption of various other proprietary functions of municipalities.

However, the above case is of importance in illustration of the principle that if there is any reasonable ground of differentiation, the law is to be sustained.

In

> Steward Machine Company v. Davis (1937), 301 U. S. 548, 81 L. Ed. 1279, 109 A. L. R. 1293,

Mr. Justice Cardozo, delivering the opinion of the Court, cited with approval the Carmichael case (supra), as holding that there was no unlawful discrimination in the Federal Social Security Act as it originally stood, and prior to the 1950 Amendments. With commendable caution, he stated (p. 1301 of 109 A. L. R., bottom of column 2):

> "The Act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."

Unless grounds of differentiation are urged, stronger than those which thus far appear, it could be argued with considerable force that gross discrimination is here created, within the meaning of the above statement of Mr. Justice Cardozo.

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The above answers your first inquiry. We turn to your second inquiry.

Possible Requirements for
Legislation or Other Steps.

We have before us the contents of Resolution No. 11226 of the Public Utilities Commission of the City and County of San Francisco, adopted on December 4, 1950, and transmitted to the Board of Supervisors. That resolution suggests the following possible steps:

(1) An instruction by the Board of Supervisors to the legislative representative of the City at Washington, D. C., to advocate a further amendment to the Social Security Act, by which the transportation system of the City and County of San Francisco would be excluded. (The terms of a proposed amendment are hereinafter set forth);

(2) If such instruction is not given, provision for payment of the City's tax through supplementary budget procedure;

(3) Formulation of a Charter Amendment by which there would be integration between Federal Social Security and City Retirement to the end that additional cost will not be imposed upon the City by reason of the 1950 Amendments. (Of course,

such plan could not become effective until ratification by the Legislature of such Charter Amendment, if adopted by the voters. In the meantime, the federal tax must necessarily be paid, which, we understand, will be at a cost to the City of between $150,000 and $175,000 a year).

To the foregoing suggestions, we add a fourth:

(4) Instruction to me as City Attorney to file suit, immediately after the first payment and after claim for refund, to test the validity of the tax, upon the ground that the tax, so far as concerns the City, is discriminatory, for the reasons hereinabove set forth.

Of course, it is not the function of this office to recommend the adoption of any one of the above steps in preference to another.

In implementation of Plan (1) (Supra), this office has been asked to draft language to be submitted to Congress if that plan is adopted, by which exclusion of San Francisco will result. We have set forth above (Supra, p. 4) the present phraseology of subdivision (1) resulting in the inclusion of San Francisco. The opposite result could be accomplished by adding this language. at the end, following the clause as to the constitutional provision, creative of this further exemption:

> ". . . or, if covered under a general retirement system which, as of January 1, 1951, shall have been in existence no later than January 1, 1937, during which time there shall have been no default in the payment of any final judgment on any obligation undertaken or assumed in or by said retirement system."

The date appearing above is the date of the first imposition of tax under Federal Social Security. It happens that the San Francisco Retirement System has been functioning since April 1, 1922 and has not defaulted on any such obligation.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. Harry D. Ross
Controller
Room 109, City Hall
San Francisco 2

ADT

Opinion No. 311
December 26, 1950

SUBJECT: PANTHERS AND LEOPARDS - NEW QUARTERS FOR PRIMATES - S.F. ZOOLOGICAL GARDENS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Included in the Budget of the Recreation and Park Department are appropriations for:

"a) New Quarters for Primates, San Francisco Zoological Gardens, $50,000;

"b) New Quarters for Panthers and Leopards, S.F. Zoological Gardens, $50,000.

"These funds were appropriated by the Board of Supervisors to replace quarters which were considered unsafe and inadequate, having been so repeatedly patched that they have reached the stage where replacement is necessary.

"The firm of Ward and Bolles, Architects, had, earlier this year, been awarded a contract for plans and specifications for the new quarters. This contract is now completed and the department is now ready to advertise for bids for the construction of the quarters. The old, unsafe quarters were torn down three months ago and the animals placed in temporary pens in order to make room for the new buildings, construction of which is considered very important and necessary by this department.

"In view of the recent order of the National Production Authority (N.P.A. Order M-4) prohibiting construction of certain types of buildings, your opinion is respectfully requested as to whether the Recreation and Park Commission may, at this time, legally award a contract for construction of the above mentioned buildings."

O P I N I O N

Section 22.4 of the National Production Authority Order No. M-4 provides as follows:

"Prohibited construction. Except as permitted in §22.5, no person shall, after the date of this part, commence construction of any building or structure to be used for or in

connection with any of the purposes specified, as set forth in §22.12 (List A)."

Section 22.3 (a) defines person as meaning

"any individual, corporation, partnership, association or any other organized group of persons and includes any agency of the United States or any other government."

Section 22.3 (2) provides as follows:

"The following activities do not constitute commencing construction: Demolition of buildings, tearing out partitions, site preparation such as excavation, grading, filling, laying down driveways, walks, railway sidings, etc., erecting temporary fences or construction barricades, work sheds and construction shanties, laying pipes, conduits and wires outside of the boundary lines of the walls of the structure, building retaining walls not physically incorporated within the structure."

Construction prohibited by the N.P.A. order applies to <u>any</u> recreational, amusement or entertainment purpose whether public or private (Section 22.12). It is patent that on its face the Zoological Gardens would be embraced within the terms of the order (Section 22.12).

It is to be pointed out, however, that Section 28 of Order No. M-4 provides for requests for adjustments or exceptions by any person to the National Production Authority on the ground that a provision works a hardship upon him not suffered generally by others in the same trade or industry or that its enforcement against him would not be in the interests of national defense.

In answer to your specific question:

There is no prohibition in Order No. M-4 against the creation of the contracts. It is performance which may or may not be rendered illegal under Order No. M-4 if the construction is prohibited, and no exception is made. No prohibited construction is to commence after October 27, 1950. A copy of Opinion No. 304 of this office, dealing with the same subject matter, is forwarded herewith for your guidance.

Respectfully submitted,

DION R. HOLM,
City Attorney.

EFD
To: Mr. Harvey E. Teller,
General Manager, Recreation
and Park Commission,
Attn: William Simons, Executive Secretary.

Opinion No. 304

December 12, 1950

SUBJECT: VALIDITY OF CERTAIN PARK-RECREATION CONTRACTS IN VIEW OF NATIONAL PRODUCTION AUTHORITY ORDER NO. M-4, EFFECTIVE OCTOBER 27, 1950.

Dear Sir:

This office is in receipt of your request for opinion as follows:

"National Production Authority Order No.M-4 issued effective October 27, 1950 has created certain problems regarding the certification of Recreation and Park Department contracts.

"Specifically I am holding the following contracts pending determination as to whether performance thereunder would be in violation of Order No. M-4.

"1. Contract with William McIntosh and Son for the construction of seating facilities at 'Big Rec' in Golden Gate Park, San Francisco.

"Bids were received on August 29, 1950 and the contract was awarded on September 14, 1950. The agreement was entered into on September 22, 1950.

"2. Contract with Ferguson Bros. for the construction of drainage corrections and installation of ejector pumps in Golden Gate Park, San Francisco.

"Bids were received on October 17, 1950 and award was made on October 19, 1950. The agreement was entered into on October 26, 1950.

"3. Contract with Ferguson Bros. for the installation of an irrigation system for the Herbert Fleishhacker Playfield, San Francisco.

"Bids were received on October 17, 1950 and award was made on October 19, 1950. The agreement was entered into on October 26, 1950.

"4. Contract with Love and Haun for the construction of sidewalks and curb at Fleishhacker Playfield and San Francisco Zoological Garden, San Francisco.

"Bids were received on October 10, 1950 and the contract was awarded on October 31, 1950. The agreement was entered into on November 9, 1950.

"In view of the restrictions imposed by National Production Authority Order No. M-4 please favor me with your opinion regarding;

"(a) can the above mentioned contracts be legally entered into, and;

"(b) can the Controller legally certify same.

"I am enclosing a copy of Order No. M-4 for your convenience."

O P I N I O N

Section 22.4 of the National Production Authority Order No. M-4 provides as follows:

"Prohibited Construction. Except as permitted in §22.5, no person shall, after the date of this part, commence construction of any building or structure to be used for or in connection with any of the purposes specified, as set forth in §22.12 (List A)."

Section 22.3 (b) defines "Construction" as follows:

"'Construction' means the erection, construction, reconstruction, restoration, or remodeling of any building, structure, or project, or additions thereto or extensions or alterations thereof."

Section 22.3 (c) defines "Commence construction" as follows:

"'Commence construction' means to incorporate into a building or other structure materials which are to be an integral part of the building or structure in question. ....."

1. Contract with William McIntosh and Son for the construction of seating facilities at "Big Rec" in Golden Gate Park, San Francisco.

Unless construction was commenced prior to October 27, 1950, the performance of this contract was rendered illegal by the provisions of Order No. M-4. Section 22.12 (List A) specifically lists "Bleachers and seating arrangements" and "Grandstands" as construction which is prohibited.

2. Contract with Ferguson Bros. for the construction of drainage corrections and installation of ejector pumps in Golden Gate Park, San Francisco.

3. Contract with Ferguson Bros. for the installation of an irrigation system for the Herbert Fleishhacker Playfield, San Francisco.

4. Contract with Love and Haun for the construction of sidewalks and curb at Fleishhacker Playfield and San Francisco Zoological Garden, San Francisco.

The purpose of the construction of the contracts listed above as Nos. 2, 3 and 4 is within the prohibited use or purposes contained in Section 22.12 (List A), to-wit:

"Any other recreational, amusement or entertainment purposes, whether public or private."

The question in these contracts is whether the installation of ejector pumps, the installation of irrigation

system, and construction of sidewalks and curbs are "buildings" or "structures" within the meaning of Section 22.4. It is to be noted also that Section 22.3 employs the word "project." The word "structure" is a broad, generic term and, in general, includes any thing constructed or built, and has been judicially defined as including a street, water mains, sewer (See: 40 Words & Phrases, permanent edition, p. 323). In the absence of further clarification of Order No. M-4 of the National Production Authority or further facts concerning the nature of the work to be performed, it would appear that the work specified in each of these contracts would come within the definition of the word "structure." Provided that the work under these contracts is commenced after October 27, 1950, the performance of each contract would appear to be made illegal by the provisions of Order No. M-4.

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With regard to all the above mentioned contracts, it is to be noted that Order No. M-4 in Section 22.5 provides for exemptions. It is assumed that none of the contracts comes within the terms of any exemption. It is also to be pointed out that Section 28 of Order No. M-4 provides for requests for adjustments or exceptions by any person to the National Production Authority on the ground that any provision works a hardship upon him not suffered generally by others in the same trade or industry or that its enforcement against him would not be in the interests of national defense.

In answer to your specific questions:

1. There is no prohibition in Order No. M-4 against the creation of the contracts. It is performance which may or may not be rendered illegal under Order No. M-4 if the construction is prohibited, no exception is made, and construction commences after October 27, 1950.

2. A certification of the contracts may be made without legal liability. Under Section 86 of the Charter, a certification would not amount to a concurrence or agreement

to an illegal performance of the contract, but is as to availability of funds "to pay the amount of the expenditure when it becomes due and payable."

Very truly yours,

DION R. HOLM, City Attorney.

TO: HARRY D. ROSS, Controller of
the City and County of
San Francisco
109 City Hall, San Francisco 2

TMO'C

Opinion No. 312
December 27, 1950

SUBJECT: SPACE FOR AMERICAN WOMEN'S VOLUNTARY SERVICES AT YOUTH GUIDANCE CENTER.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "The American Women's Voluntary Services has asked that this department provide a small space in the new Youth Guidance Center for a day program for handicapped children, in accordance with the attached copy of communication.
>
> "We have a small space available, and in view of the fact that the Center was established for the welfare of children it is believed that this project would fit into the general over-all program.
>
> "The Juvenile Probation Committee unanimously approved the request, and presented the matter for clearance with your department. If this does not present a legal complication we should be very happy to have your approval."

O P I N I O N

It is with regret that I come to the conclusion reached in this matter but the state of the law impels me so to do. As noted, exclusive of any charter provision, by the Attorney General's Opinion NS4754 1 AG161, a county cannot grant the use of its rooms, court houses and public grounds to private or religious or charitable groups.

The basis of the opinion referred to above is that the county may not impose taxes except for public purposes. CITY OF LOS ANGELES v. LEWIS, 175 Cal. 777 is authority holding that the use of such property by private groups cannot be granted on the fundamental proposition that to permit such use would be to authorize taxation for private purposes.

Your attention is also invited to my opinion No. 215, wherein I was forced to hold that there was no authority in the Charter to permit the Board of Fire Commissioners to authorize the Phoenix Society of San Francisco to develop in any properties under the Commission's jurisdiction a historic museum outlining the history of the Fire Department in San Francisco.

While the program of the A.W.V.S. is laudable and its purposes heart-warming, it is still a private charitable organization and I am compelled reluctantly to advise, you cannot legally afford it the facilities it requested.

Respectfully submitted,

DION R. HOLM,
City Attorney.

EFD

To: Mr. George W. Ososke,
Chief Probation Officer.

OPINION NO. 215
July 21, 1950

SUBJECT: AUTHORITY OF BOARD OF FIRE COMMISSIONERS TO PERMIT PRIVATE ORGANIZATION TO HOLD MEETINGS AND CONDUCT A MUSEUM ON FIRE DEPARTMENT PROPERTY; PHOENIX SOCIETY.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"The Board of Fire Commissioners ask that an Opinion be rendered to this Board relative to the following letter:

June 27, 1950.

Board of Fire Commissioners,
San Francisco Fire Department,
City Hall,
San Francisco, California.

Gentlemen:

The Phoenix Society of San Francisco for some time has been desirous of obtaining a regular meeting place with the thought of developing it into a museum of San Francisco Fire Department history. In order to start this program we wish to obtain your permission to hold our meetings and accumulate material at the quarters on Octavia Street formerly occupied by the Salvage Corps and at present being partially used by the Auto School.

We will appreciate your informing us the terms under which you would be willing to permit us to use these quarters. We shall be entirely willing to sign any waiver of non-responsibility or carry such insurance as you may consider necessary.

Our goal is to build up a collection which will become a show place for residents and visitors alike which will be available at all reasonable hours. Of course, we will expect to vacate these quarters whenever their full use is required by the Fire Department.

Ultimately, we hope to assemble a representative collection of historical objects including a steam pumper complete with harness and as much other old-time equipment as can be located.

Your favorable consideration will be appreciated by the Society.

Very truly yours,

(Signed) S. G. Clark.

QUESTION

Can the Board of Fire Commissioners permit the use of the property of the Fire Department for the purposes of developing a museum of the San Francisco Fire Department history? Said property to be used by a private organization, namely, The Phoenix Society of San Francisco. If so, under what conditions may the Board grant this usage."

OPINION

It is well appreciated that the philanthropic effort of the Phoenix Society of San Francisco is most meritorious and that their offer would be not only of great interest to the visitors to the museum but would also make the citizens of San Francisco more appreciative of the problems of the Fire Department. It is incumbent upon me, however, to determine whether the charter of the City and County of San Francisco would permit the Board of Fire Commissioners to allow the use of premises under its jurisdiction to a private organization. It is necessary, therefore, to review the request in light of the charter.

Sections 36, et seq., of the Charter, outlining the authority of the Board of Fire Commissioners, is silent with respect to any authority of the Fire Commission to permit private organizations to use its premises for either holding meetings or to conduct any private enterprise, including the development of a museum.

Section 91 of the Charter provides that the Director of Property shall have charge of the sale and lease of all real property except as otherwise provided by the Charter.

Section 93 provides,in part, as follows:

> "When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease."

It is apparent from the reading of Section 93, as quoted above that should the Board of Fire Commissioners feel that they have

surplus property, the Board of Supervisors may by ordinance authorize the lease of said property. The section, however, also provides that the Director of Property must ask for bids and that the lease must be granted to the highest responsible bidder at the highest monthly rental. The lease may not exceed a period of twenty years. There is no guaranty, of course, that the Phoenix Society will be the highest bidder. There is apparently no other means permitted by the Charter other than as provided by Section 93.

I must therefore advise that there is no authority in the Charter which would permit the Board of Fire Commissioners to authorize the Phoenix Society of San Francisco to hold meetings on the Commission's property, or to develop in any properties under the Commission's jurisdiction a historic museum outlining the history of the Fire Department in San Francisco.

It may well be that the Phoenix Society of San Francisco may be interested in donating to the City and County of San Francisco various exhibits. Should this be the case, and should the Fire Commission itself have the necessary facilities and should it in its judgment feel that such a museum would make the citizens of San Francisco more cognizant of the problems of the Fire Department, the Fire Commission may provide for the establishment of such a museum.

Respectfully submitted,

DION R. HOLM,
City Attorney.

To: Board of Fire Commissioners
2 City Hall
San Francisco 2
Attn: Mr. Thomas W. McCarthy, Secretary.

RJB

Opinion No. 313
December 29, 1950

SUBJECT: VOTE OF BOARD OF SUPERVISORS APPLICABLE TO APPROVAL OF SCHEDULE OF RATES FOR SAN FRANCISCO AIRPORT.

Dear Sir:

You have requested an opinion of this office as follows:

"Reference is made to the schedule of rates and charges governing operations at the San Francisco Airport to become effective January 1, 1951, as adopted by the Public Utilities Commission under its Resolution No. 11,182 of November 20, 1950.

"Reference is also made to Board of Supervisors File No. 6677, Resolution No. 10,628 of December 18, 1950, captioned: 'Approving Schedule of Rates and Charges applicable to the San Francisco Airport'. In part, said Resolution reads:

"'RESOLVED, That said schedule of rates and charges applicable to the San Francisco Airport, copy of which is on file in the Clerk's office of the Board of Supervisors and incorporated in this resolution by reference, be and it is hereby approved.'

"The record of the vote on the Resolution aforesaid is Ayes 7; Noes 3; Absent 1.

"The Public Utilities Commission, in making its presentation to the Board of Supervisors, admitted that the schedule of rates and charges for the San Francisco Airport, as proposed under its Resolution No. 11,182, would not be, to use the language of Charter Section 130, 'sufficient to pay for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility xxxx.'

"In view of the foregoing will you please furnish me with your Advice and Opinion as to whether or not the second clause of the fourth paragraph of Charter Section 130 should apply; which is to say, the vote of the Board of Supervisors should have numbered not less than 8 Ayes (2/3) in order to legally approve the schedule proposed by the Public Utilities Commission, whereas, only 7 Ayes are of record."

O P I N I O N

Section 130 of the Charter provides in its last paragraph for the vote of the Board of Supervisors on consideration of a utility rate schedule. This paragraph is as follows:

> "Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction and extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit. All other changes in rates, charges or fares as proposed by the commission shall be submitted by the commission to the board of supervisors for approval, and, except as in this section otherwise provided, it shall require a two-thirds vote of the board of supervisors to reject the rate changes as proposed by the commission, and if so rejected, such proposed changes in schedules of rates, charges or fares shall be returned to the commission for revision. If the supervisors shall fail to act on any such proposed schedule within thirty days, the schedule shall thereupon become effective." (Emphasis throughout is ours.)

The question here is the meaning and effect of the proviso contained in the first sentence of this paragraph, underscored above.

This proviso was construed in the case of Hurst v. City and County of San Francisco, 33 Cal. 2d 298; 201 P. 2d 805. Petitioners there sought by mandamus to compel the Public Utilities Commission to put into effect a straight 10-cent passenger fare schedule for the City transportation system. The Commission made its order increasing the fare in October, 1948. The Board of Supervisors in November, 1948, refused to approve the schedule, by a majority vote, which negative vote was less than a two-thirds majority.

Petitioners supported their petition on two grounds. The first was that in the next succeeding fiscal year (1949-1950) the revenue under the proposed rate would be sufficient for the purposes set forth in the first sentence of the paragraph above quoted. The Court refused to consider this proposition. (See opinion, p. 301.)

The second ground was that the proviso above quoted (requiring 8 votes of the Board members in favor of approval of the proposed rate) "is operative only when it is necessary for the board of supervisors to levy a tax to make up a deficit resulting from a rate schedule insufficient to earn an amount equal to the operating expenses."

As to this ground, the Court said, this "seems to be the only reasonable interpretation of section 130."

The Court further said:

> "It is true that section 130 calls for a rate sufficient to meet the operating expenses for the succeeding fiscal year but the part to be played by the board of supervisors relates to a situation where taxes must be levied to make up a deficit. It is clear from section 130 that the primary duty and right to fix rates rests with the commission rather than the board. It is only in the specific instance mentioned in the italicized portion of section 130, and when the board acts by a two-thirds majority to reject the commission's proposed rate, that the board is concerned with the fares. Unless the primary power of the commission is to be unequivocally curtailed, the language of the section (130) must be construed to uphold it. The italicized portion of section 130 is in the form of a proviso, that is, an exception, and for that reason should not be construed to limit the general power except to the extent that it clearly does so. (See, McAlpine v. Baumgartner, 10 Cal. 2d 409 /74 P. 2d 753/.) Examining particularly the language of the proviso, it should be noted that a rate schedule which is insufficient to defray operation costs may be proper if the board approves it by the required vote, but it does not stop there. It goes on to say, 'and it shall be incumbent' to provide a tax levy to meet the deficit. In other words the approval of the board by a two-thirds vote of a fare schedule fixed by the commission is necessary only when the result would be a deficit which must be met by a tax levy. The tax levy is obligatory -- mandatory, thus there would be no occasion for an approval by a two-thirds vote of the board unless there would also be a deficit and a tax levy would be indispensable."

In amplification of the above quotation, it is to be noted that Section 130 states that it shall thereupon be incumbent upon the Board to levy a tax. The word "thereupon" obviously relates to the time for provision "by tax levy for the additional amount necessary to meet such deficit."

In the subject instance, it is not within the power of the Board "thereupon" (concurrently with its determination after its rate hearing) to levy a tax. This fiscal year is entirely financed. Even as to the next fiscal year, there is no basis for knowledge of the necessity for tax support of the airport for the next succeeding fiscal year until the budget estimate is presented for that year. Calculation of the necessary figure in the tax rate cannot be accomplished until adoption of the budget.

Statements may be made or opinions held in this regard, but the only means of knowing in advance which is provided by the Charter is the budget. How quickly conditions affecting transportation may change is indicated by the following quotation from Mullins v. Henderson, 75 C.A. 2d 117, 125, to wit:

> "The evidence shows and the trial court found that as the result of the wars in which the United States was engaged, the port of San Francisco had become the greatest naval port in the world."

Months ahead few would have predicted this. The question of a deficit is not to be left to prognostication concerning the future, but to the budget process, the only official prediction.

Reverting to the Hurst case, the Commission adopted the fare schedule in the month of October. (The airport schedule was adopted in November.)

In the Hurst case, it was argued by the respondents that if the petitioners' contentions were sustained, it would follow that a new rate might be fixed not merely in the month of October or November but at any other time in such manner as to go into effect one day after the commencement of the fiscal year. But as to this the Court said as follows:

> "The fear that the board of supervisors will not be in a position to protect the taxpayers in such cases as where the commission might fix a schedule to go into effect the day after the commencement of a fiscal year is not well founded. The board may always reject the proposed schedule under the last portion of section 130."

The same fear exists with no more force in the present case.

To conclude, the Supreme Court has interpreted strictly the proviso for 8 vote approval. Eight vote approval of the Commission's action is therefore required solely in instances where it is thereupon incumbent upon the Board to levy a tax to meet the deficit. Such is not the case here, and the proviso does not apply.

(A separate response will be made to your inquiry respecting certain leases.)

You are advised accordingly.

Respectfully submitted,

DION R. HOLM,
City Attorney.

To: Mr. Harry D. Ross,
Controller.

WP
ADT